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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

Nos. [redacted] 62

NORTHERN NATURAL GAS COMPANY,
a corporation,
Appellant,

VERSUS

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

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December, 1961.

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In the

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OCTOBER TERM, 1961

Nos. .....

NORTHERN NATURAL GAS COMPANY,
a corporation,
Appellant,

VERSUS

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

Appellant appeals from two final judgments of the Supreme Court of Kansas that upheld as valid two orders and a rule issued by the Corporation Commission of that State, which, under the guise of controlling the ratable production of natural gas, had the operational effect of regulating appellant's purchases of gas for transportation and sale in interstate commerce for resale. Accordingly, appellant, as authorized by paragraph 3 of Rule 15 of this Court, submits herewith this single jurisdictional statement covering both such appeals.

OPINIONS BELOW

The opinion of the Kansas Supreme Court in Case No. 42,128 is reported in 188 Kan. 355, 362 P.2d 599.[1] Such Court's opinion denying rehearing in this case is reported in 188 Kan. 624, 364 P.2d 668.[2] No opinion was rendered by the District Court.[3] The order of the Kansas Corporation Commission involved in this case is unreported but is attached hereto as Appendix D.

The opinion of the Kansas Supreme Court in Case No. 42,127 is reported in 188 Kan. 351, 362 P.2d 609.[4] Such Court did not render an opinion in denying rehearing in this case. The District Court did not render an opinion herein.[5] The order and rule issued by the Kansas Corporation Commission are not reported but are set forth in Appendix G attached hereto.

JURISDICTION

These actions were brought by appellant in the District Court of Finney County, Kansas, under G.S. 1949, 55-707,[6] to review and set aside two orders and a rule issued by the Kansas Corporation Commission. The jurisdictional background of such actions, which were desig-

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[1] Also attached hereto as Appendix A.

[2] Also attached hereto as Appendix B.

[3] The Judgment entered by the District Court is attached hereto as Appendix C.

[4] Also attached hereto as Appendix E.

[5] The Judgment of the District Court is attached hereto as Appendix F.

[6] See Appendix H hereto.

nated Case No. 42,128 and Case No. 42,127 in the Kansas Supreme Court, is as follows:

Case No. 42,128

This case deals with the validity of an order (Appendix D) of the Kansas Commission dated October 7, 1959, directing this appellant "to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field," but which order, in reality, was one regulating, under the guise of accomplishing ratable production of gas, appellant's purchases of gas in said field for transportation and sale in interstate commerce for resale. (Said Commission order was rescinded on February 8, 1960, after the Commission issued its order and rule which is the subject matter of the action in Case No. 42,127.) The District Court on April 8, 1960, entered judgment (Appendix C) affirming said order of the Kansas Commission. Motion for new trial was overruled on April 27, 1960. By opinion (Appendix A) filed June 10, 1961, the Kansas Supreme Court, with one Justice dissenting, affirmed the judgment of the District Court. Such Supreme Court, with the same Justice dissenting, denied appellant's motion for rehearing on August 31, 1961 (Appendix B). Notice of appeal was filed in the Kansas Supreme Court on November 17, 1961.

Case No. 42,127

This case deals with the validity of an order and accompanying rule (Appendix G) issued by the Kansas Commission, effective February 8, 1960, directing each purchaser of gas in each common source of supply under proration in Kansas to "take gas in proportion to the

allowables from all the wells to which it is connected," but which order and rule, in reality, constituted the regulation of appellant's purchases of gas for transportation and sale in interstate commerce for resale under the guise of accomplishing the ratable production of natural gas in such common sources of supply. Such order and rule were affirmed by the District Court of Finney County, Kansas, on April 8, 1961 (Appendix F) and motion for new trial was overruled on April 27, 1961. The judgment of the District Court was affirmed by the Kansas Supreme Court, one Justice dissenting, in an opinion filed June 10, 1961 (Appendix E), and on September 19, 1961, the Kansas Supreme Court denied (without opinion) appellant's motion for rehearing. Notice of appeal was filed in the Kansas Supreme Court on November 17, 1961.

The jurisdiction of the Supreme Court of the United States to review the decisions and judgments of the Kansas Supreme Court is conferred by 28 U.S.C.A., §1257(2), 62 Stat. 929.

Decisions sustaining the jurisdiction of the Supreme Court to review the judgments in these cases are as follows:

—*Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035;

Natural Gas Pipeline Co. v. *Panoma Corp.*, 349 U.S. 44, 75 S. Ct. 576, 99 L. Ed. 866;

Cities Service Gas Co. v. *State Corporation Commission of Kansas*, 355 U.S. 391, 78 S. Ct. 381, 2 L. Ed.2d 355.

STATUTE INVOLVED

In Case No. 42,128 in the Kansas Supreme Court, the Kansas Corporation Commission order[7] under review was dated October 7, 1959, and provided:

> "IT IS, THEREFORE, BY THE COMMISSION ORDERED: That Northern Natural Gas Company be and it is hereby ordered to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field."

In Case No. 42,127 in the Kansas Supreme Court, the Kansas Corporation Commission order and rule[8] under review were issued effective February 8, 1960, and such rule ordered:

> "Rule 82-2-219
>
> "RATABLE PRODUCTION OF GAS FROM COMMON SOURCE OF SUPPLY
>
> "In each common source of supply under proration by this Commission, *each purchaser shall take gas* in proportion to the allowables *from all the wells to which it is connected* and shall maintain all such wells in substantially the same proportionate status as to over production or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of well to produce proportionately with other wells connected to the purchaser. (Authorized by G.S. 1959 Supp. 55-703; Effective February 8, 1960.)" (Emp. added).

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[7] See Appendix D.

[8] See Appendix G.

The Kansas statute, G.S. 1959 Supp., 55-703,[9] upon which the orders and rule were based provides, in pertinent part, as follows:

> "Whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor of or against any producer in any such common source of supply."

Statutory and constitutional provisions upon which appellant relies for reversal of the judgments herein are

[9] Set forth in full in Appendix I hereto

pertinent provisions of the Natural Gas Act, 15 U.S.C.A. §717, *et seq.*, 52 Stat. 821, *et seq.*, and, the Constitution of the United States, clause two of Article VI.

QUESTION PRESENTED

Does the State of Kansas have jurisdiction, under the guise of regulating production and in the face of the provisions of the Natural Gas Act and Federal Power Commission regulations thereunder, to control the sale of natural gas in interstate commerce for resale after the production and gathering thereof has ended, by directing a natural gas company purchaser, operating under subsisting gas sales contracts with its producers, to make its purchases in a manner or at a rate contrary to such contracts which are on file with the Federal Power Commission as effective rate schedules and on which certificates of public convenience and necessity authorizing such sales have been issued?

STATEMENT

Appellant, Northern Natural Gas Company,[10] is a corporation engaged in the business of purchasing natural gas for transportation and sale in interstate commerce for resale for ultimate public consumption and is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act, 15 U.S.C.A. §717a (R. 31-32, 73-74, 154, 159, 182, No. 42,128; R. 37, 78-79, 89-190, No. 42,127). Northern is not a producer of natural gas. (R. 44, 157-158, No. 42,128; R. 50, 100, No. 42,127). The Kansas Hugoton Gas Field

[10] Hereinafter referred to as "Northern."

has been one of Northern's most important sources of gas supply from the formation of the company to the present time (R. 32, 38, 40-41, No. 42,128; R. 37, 43, 45-46, No. 42,127).[11] Northern's initial contract for gas supply in such field was dated May 27, 1930, and was between predecessors in interest of Northern and Republic Natural Gas Company.[12] On December 21, 1945, Northern and Republic entered into a new contract (hereinafter referred to as the Republic "A" Contract) superseding the original contract and amendments thereto. This contract, as subsequently amended, covers the sale of gas by Republic to Northern from approximately 144 wells in the Kansas Hugoton Gas Field (R. 33, No. 42,128; R. 38-39, No. 42,127).

Under the Republic "A" contract, as amended, as under the prior contract dated in 1930, certain maximum and minimum quantities of gas are specified for sale and purchase between the parties (R. 34-37, No. 42,128; R. 39-43, No. 42,127). The Kansas Supreme Court, in the case of *Northern Natural Gas Co. v. Republic Natural Gas Co.*, 172 Kan. 450, 241 P.2d 708,[13] determined that Northern should regulate its purchases from the Republic "A" wells so that at the end of each contract accounting year it will have purchased therefrom the volume of gas Republic is entitled to produce and deliver to Northern under valid Kansas Corporation Commission proration orders for that particu-

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[11] There are six other major purchasers of gas from this field (R. 75, No. 42,128; R. 80, No. 42,127).

[12] Hereinafter referred to as "Republic."

[13] Such opinion was filed March 8, 1952, more than two years prior to Federal Power Commission Orders series 174, requiring Federal Power Commission certification of sales and service to be rendered pursuant to such contract.

lar year (such volumes will hereinafter be referred to as the "legal allowables" of the Republic "A" wells). Since such court decision, Northern has endeavored to purchase the legal allowables of the Republic "A" wells during each contract year (R. 39, No. 42,128; R. 44-45, No. 42,127).

Beginning in 1938 Northern contracted to buy additional gas supply in the Kansas Hugoton Gas Field from various producers. Northern currently has about 125 gas purchase contracts with producers in said field under which approximately 1,100 wells have been connected to Northern's gathering system in such field (R. 40-41, No. 42,128; R. 45-46, No. 42,127).[14] All of such contracts provide that Northern shall purchase gas ratably from the wells thereunder with all other wells, except the Republic "A" wells, connected to its system in the Kansas Hugoton Field. All of such contracts specifically exempt the volume Northern is obligated to purchase from the Republic "A" wells in determining each seller's ratable production under each such contract.[15]

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[14] Under Federal Power Commission Orders series 174 such gas sales contracts were filed as rate schedules with the Federal Power Commission and certificates by it issued authorizing the sales and service contemplated thereunder (R. 42, No. 42,127).

[15] The ratable purchase provision of Northern's contract with Cities Service Oil Company dated September 9, 1949, is typical of all of Northern's other contracts in the Kansas Hugoton Gas Field and provides, in pertinent part, as follows:

> "*Section 3. Northern's Obligation to Purchase Gas.*
>
> (a) *Ratable Purchase of Gas.* Northern agrees to purchase and receive from Seller hereunder, subject to the provisions of subparagraphs (b) • • • of this Section 3, gas produced from any common source of supply underlying the acreage described • • • ratably (without discrimination) with all natural gas purchased and produced by Northern from the same common source of supply situated in the Kansas portion of the Hugoton Gas Field • • •.

From 1944, the date of initial proration of production in the Kansas Hugoton Gas Field, until 1958, there was no important difference between Northern's purchases from the Republic "A" wells and other wells connected to its system in said field. Northern's purchases from all wells to which it was connected were substantially ratable as between such wells in such field over reasonable periods of time (R. 49-52, No. 42,128; R. 54-57, No. 42,127). In the spring of 1958, however, a material difference developed in this respect. Such difference resulted from two factors. First, the Kansas Corporation Commission by its market demand orders had, since 1956, granted allowables to the wells in this field of approximately 130 billion cubic feet in excess of the total field production (R. 162, No. 42,128).[15] Secondly, Northern had been seriously delayed in expanding its system to new markets by reason of failure in securing the necessary certificates of public convenience and

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[15] (Continued)

(b) *Prior Obligations.* This contract is made expressly subject to the obligations of Northern under the following gas purchase contracts, and the volumes of gas which Northern is obligated to purchase thereunder, plus such reasonable volumes of gas as Northern may take in excess of said volumes in order to avoid any penalty which might accrue for failure to take the volumes Northern is obligated to purchase * * *.

* * * * * *

(ii) The Gas Purchase Contract dated December 21, 1945, as now or hereafter amended or revised, with Republic Natural Gas Company, or any new contract which supersedes said contract of December 21, 1945 (R. 42-44, No. 42,128; R. 47-49, No. 42,127).

[16] The validity of such Kansas Commission orders is being contested in numerous cases docketed and pending in the Supreme Court of Kansas, including those numbered 41515, 41516, 41585 and 41586.

necessity from the Federal Power Commission (R. 52, No. 42,128; R. 57, No. 42,127). Since Northern was obligated to and did purchase the legal allowables from the Republic "A" wells, the action of the Kansas Commission in fixing the high allowables plus the failure to connect anticipated new markets resulted in substantial underproduction accruing to wells other than the Republic "A" wells connected to Northern's system in the Kansas Hugoton Field (R. 53, 55, No. 42,128; R. 58, 60, No. 42,127).

On May 27, 1959, the Kansas Corporation Commission issued an order requiring Northern to show cause why it should not purchase gas ratably from all wells to which it is connected in the Kansas Hugoton Field (R. 29-30, No. 42,128; R. 34-36, No. 42,127). After conclusion of the hearing on said show cause order, the Kansas Commission issued its order dated October 7, 1959, whereby Northern was required to purchase gas ratably from all of such wells. It is this order (rescinded on February 8, 1960) which was involved in Case No. 42,128 in the Kansas Supreme Court (R. 71-73, 82-87, 154, No. 42,128).

On November 12, 1959, the Kansas Commission initiated proceedings for the adoption of a rule to require all purchasing companies to purchase gas ratably from all wells to which they are connected in the same common source of supply in the State of Kansas (R. 30-31, No. 42,127). The record before such Commission in Case No. 42,128 was incorporated into this proceeding (R. 32-34, No. 42,127). After further hearings, the Kansas Commission on February 3, 1960, issued an order promulgating Rule 82-

2-219 requiring each purchaser in any common source of supply under proration to "take" (i.e., purchase) gas from all wells to which it is connected in proportion to the allowables thereof and to maintain all such wells in substantially the same proportionate status as to overproduction and underproduction (R. 94-98, No. 42,127) (Appendix G). It is this order and rule which were involved in Case No. 42,127 in the Kansas Supreme Court (R. 180, No. 42,127).

How the Federal Question is Presented

In its petitions for judicial review in the District Court of Finney County, Kansas, in the instant cases, Northern alleged as grounds for reversal the identical reasons which it had placed before the Kansas Corporation Commission in its petitions for rehearing of the Commission's orders. Northern alleged that said orders and rule were unlawful, illegal, unconstitutional, beyond the jurisdiction of said Commission and void among others, because they purport:

> "* * * to strike down and amend the express provisions in all of petitioner's gas purchase contracts in the Kansas Hugoton Gas Field by which all producers selling gas to petitioner have agreed to the apportionment of Northern's gas requirements amongst them, thereby (a) casting an unlawful burden upon, impairing and impeding the interstate operations of petitioner in the purchase, transportation and sale in interstate commerce of natural gas for resale taken by petitioner from said Kansas Hugoton Gas Field in violation of the commerce clause of the United States, (b) in impairment of and contrary to the exclusive jurisdiction of the Federal Power Commission under the subsisting provisions of the Natural Gas Act, 15

U.S.C.A. 717, *et seq.*, and etc. in impairment of the obligations of such gas purchase contracts in violation of Section 10 of Article I of the Constitution of the United States." (R. 7, No. 42,128; R. 7, No. 42,127).

After Northern was denied relief in the District Court, it again raised the same federal constitutional and statutory issues in its appeals to the Kansas Supreme Court. Such latter court specifically passed upon the federal questions raised by Northern and denied the validity of same. In the syllabus prepared by the Court in Case No. 42,128 it summarized its holdings as follows:

> "It is further decided that such an order as described in the first paragraph hereof did not impair the obligation of a contract possessed by the purchaser or impinge upon other constitutional rights of the purchaser.
>
> "It is also further decided that the order of the Commission as to the equitable taking of natural gas concerns only the production and gathering of gas and in no way impairs the control of the Federal Power Commission over the transportation of natural gas in interstate commerce under the federal Natural Gas Act, 15 U.S.C.A. 717, *et seq.*" (R. 152, No. 42,128).

In discussing the case of Northern's Motions for Rehearing, the Kansas Supreme Court had this to say with respect to the federal questions raised herein:

> "* * * It [the statute] * * * [omitted] that the statute also requires reasonable purchases of gas. It then warns the court not to invade the jurisdiction of the Federal Power Commission by dealing with purchasers. * * *." (Bracketed word added).

"We fail to see how the order affects interstate commerce in any way. * * *"

"It is not important in this case that the purchaser has a contract to purchase the gas at a price, which we will assume is subject to the regulation and jurisdiction of the Federal Power Commission, *but the only important matter is that the 'taker' take gas so that it may be produced.* * * *" (Emp. added.) (R. 182-183, No. 42,128.)

THE QUESTIONS ARE SUBSTANTIAL

These cases bring before this Court serious questions concerning the power of a state to interfere with and impose its requirements on the purchasing operations of an interstate natural gas pipeline company whose activities, including the manner in which it purchases natural gas under executed contracts with gas-producers, are subject to comprehensive control by the Federal Power Commission under the provisions of the Natural Gas Act. The purpose and objective of these state regulations is quite clear. It is nothing less than to force Northern to increase its purchases of gas from the wells to it connected in the Kansas Hugoton Gas Field beyond the amount of gas it requires therefrom to satisfy its interstate markets and in excess of its contractual obligations to producers to it connected in such field.[17] If Northern fails to comply with such regulations it submits itself to severe penalties (G.S. 1949, 55-708, 709, and 710). On the other hand, Northern's

[17] The Kansas Supreme Court acknowledged [illegible] denying rehearing in Case No. 42128, it said:

"Thus, in 1958, the Commission may have been, in a round about way, endeavoring to set up ratable taking as between

interstate market requirements from the field are such that it cannot comply with such state regulations without running the risk of threatened lawsuits for millions of dollars by Republic Natural Gas Company, as producer, under a theory that Northern has not met its contractual obligations to purchase gas from wells belonging to such producer. Although promulgated by the State under the guise of regulating the production of natural gas, these state regulations clearly and directly control sales and service of gas committed to and actually moving in interstate commerce for resale.

The resolution of these questions will have a far-reaching effect on the natural gas industry as a whole. If the Federal Power Commission function is to protect adequate service to ultimate consumers in the interstate markets of the respective pipe line companies, it must have jurisdiction to regulate such service at the source as well as at the end of interstate transmission. Certainly, it has been assumed in line with *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, and subsequent decisions, that sales of natural gas in interstate commerce for resale by producers, and perforce the purchase thereof by interstate pipeline companies, after production and gathering has ended, were beyond the power

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17 (Continued)

Kansas wells and Oklahoma wells by increasing the allowables of the Kansas wells." (R. 183, No. 42,128.)

In view of the Kansas Supreme Court's citation in the aforesaid opinion denying rehearing, of the July 10, 1961 *Newsweek* article, appellant has attached such article as Appendix B(a) hereto. Although there are many gross misstatements of fact in such article, the fact that it was cited and referred to in such opinion accurately reflects the attempt of the State of Kansas to require purchasers to increase their purchases of Kansas Hugoton gas.

of the state to control. If this assumption is erroneous, it is imperative that all segments of this vital industry be so advised.

The Natural Gas Act Grants to the Federal Power Commission exclusive jurisdiction over the regulation of the sale of natural gas in interstate commerce for resale in all its aspects.

As this Court is well aware, Congress in enacting the provisions of the Natural Gas Act evidenced an intent to provide for a comprehensive and effective regulatory scheme. *Panhandle E. Pipe Line Co. v. Public Serv. Com.*, 332 U.S. 507, 520, 68 S. Ct. 190, 197, 92 L. Ed. 128. To that end Congress specifically charged the Federal Power Commission with the responsibility of regulating, under Sections 1, 4, 5, and 7 of the Natural Gas Act, the transportation and sale in interstate commerce of natural gas for resale for ultimate public consumption and natural gas companies engaged in such transportation or sale while, at the same time, leaving to the states certain areas of responsibility, such as the drilling and spacing of wells and the like.[18]

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[18] *Colorado Interstate Gas Co. v. Federal P. Com.*, 324 U.S. 581, 602-603, 65 S. Ct. 829, 89 L. Ed. 1206. Similarly, a state may determine common sources of supply of oil and gas, require production separately from separate producing formations found within the common well bore, and restrict the commingling of production therefrom, restrict the production from developed leases for purposes of conservation and protection of correlative rights, provide means for proper measurement of production, require well completion in such a manner as to protect fresh water strata and prevent the intrusion of salt water into producing formations, control secondary methods of recovery, waterflooding, etc.

One of the questions presented by these appeals is whether the State of Kansas has jurisdiction, in the face of the provisions of the Natural Gas Act and the Federal Power Commission regulations thereunder, to require a natural gas company purchaser after production and gathering has ended, to increase its purchases of gas for transportation and resale in interstate commerce or face possible contractual liability, by directing such company to make its purchases in a manner or at a rate contrary to its gas sales contracts theretofore filed with and approved by the Federal Power Commission and on which certificates of public convenience and necessity authorizing such sales were issued.

From 1954 to date, the decisions of this Court and all other federal courts have clearly indicated that the area of activity attempted to be regulated by the State of Kansas herein is subject to the exclusive jurisdiction of the Federal Power Commission and that the state is powerless to enforce its edicts with respect thereto. On June 7, 1954, this Court, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682-684, 74 S. Ct. 794, 799, 800, 98 L. Ed. 1035, said with respect to the Federal Power Commission's authority to regulate "sales" of natural gas in interstate commerce for resale under the Natural Gas Act:

> "* * * we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline com-

> pany. * * * Thus, we are satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission systems."

In 1955, in the case of *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44, 75 S. Ct. 576, 99 L. Ed. 866, the question was whether Oklahoma could fix a minimum price to be paid for natural gas, after its production and gathering is ended, by a company which transports the gas for resale in interstate commerce. In concluding that the state was powerless to so fix the price, this Court said:

> "We held in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794, that such a sale and transportation cannot be regulated by a state but are subject to the *exclusive regulation* of the Federal Power Commission." (Emp. added.)

In 1958, this Court reversed decisions of the Kansas and Oklahoma Supreme Courts holding that the state had authority to fix minimum prices for natural gas sold in interstate commerce for resale where such sale occurred at or near the wellhead of the producer's well. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, 78 S. Ct. 381, 2 L. Ed.2d 355; *Phillips Petroleum Co.* v. *Corporation Commission of the State of Oklahoma*, 355 U.S. 425, 78 S. Ct. 409, 2 L. Ed.2d 412.

15 U.S.C.A. 717(a), 52 Stat. 821, specifically declares:

> "* * * that *Federal regulation* in matters relating to the transportation of natural gas and the *sale thereof in interstate and foreign commerce is necessary in the public interest.*" (Emp. added.)

The clear import of this Court's recent decisions construing the Natural Gas Act is that a sale of gas in interstate commerce for resale is subject to *the exclusive regulation* of the Federal Power Commission. The Supreme Court of Kansas, in its opinion denying appellant's motion for rehearing, fully recognizes and states that it has read these recent cases, but that Court understands this Court's cases to deal only "with the question of the power to *regulate the price of gas*" (R. 182, No. 42,128) (Emp. added.) That Court has apparently not given recognition to the meaning of the word "regulate" as defined by this Court long ago in *Dayton-Goose Creek R. Co. v. United States*, 263 U.S. 456, 478, 44 S. Ct. 169, 68 L. Ed. 388, 398. It is there said, with respect to the meaning of the word "regulate" as it pertained to the commerce clause:

> "It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited *to the fixing of reasonable rates* and the prevention of those which are discriminatory, and that, when these objects are attained, *the power of regulation is exhausted.*" (Emp. added.)

This is exactly the same position the Kansas Supreme Court has taken in construing the recent opinions of this Court dealing with the regulation of a sale of gas in interstate commerce for resale. The fallacy of the Kansas Supreme Court's reasoning is pointed up clearly in the *Dayton-Goose Creek* case, *supra*, where this Court said:

> "This is too narrow a view of the commerce clause. *To regulate in the sense intended is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned,*

as well as the public at large, and to promote its growth and insure its safety." (Citing many cases) (Emp. added.)

To paraphrase the language of this Court just quoted appellant here asserts that:

"To regulate a sale of gas in interstate commerce for resale in the sense intended by the Natural Gas Act and this Court's construction thereof is to foster, protect and control the sale of gas in all its aspects. Otherwise, not only the interests of those immediately concerned but the ultimate public consumer as well, will not be protected and the safety and growth of interstate commerce insured."

In 1961, in the case of *F.P.C. v. Transcontinental Gas Corp.*, 365 U.S. 1, 81 S. Ct. 435, 5 L. Ed.2d 377, 390, in interpreting the Natural Gas Act with respect to the jurisdiction of the Federal Power Commission thereunder as opposed to possible state regulatory authority, this Court said:

"* * * Therefore, when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. Compare Guss v. Utah Labor Relations Board, 353 U.S. 1, 77 S. Ct. 698, 699, 1 L. Ed. 2d 691. That is to say, in a borderline case where congressional authority is not explicit, we must ask whether state authority can practically regulate a given area and, if we find that

it cannot, then we are impelled to decide that federal authority governs."[19]

In view of this Court's explicit holding in the *Natural Gas Pipeline Co.* case, *supra*, that the Federal Power Commission has exclusive jurisdiction to regulate "a sale and transportation," the "no man's land" of regulations has been occupied and the question has already been resolved contrary to the holding of the Kansas Supreme Court in these cases which should of necessity lead to a review and reversal of such Kansas court decisions by this Court. *C.f., Michigan Consol. Gas Co. v. Panhandle Eastern Pipe L. Co.*, 173 F.2d 784, 789.

Thus this Court has definitely determined that the authority of the state to regulate commerce in natural gas does not extend to *any* aspect of a sale where such sale is in interstate commerce for resale.

In the face of the numerous decisions of this Court and other federal courts cited herein, the Kansas Supreme Court in these cases has held (R. 159, No. 42,128):

> "As above noted, we are quite well aware that Northern is engaged in the transportation and sale of natural gas in interstate commerce by pipe line. We do not believe, however, that the matters dealt

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[19] Similarly in two certificate cases, *Sun Oil Company v. Federal Power Commission*, 364 U.S. 170, 80 S. Ct. 1388, 4 L. Ed. 2d 1639 and *Sunray Mid Continent Oil Co. v. FPC*, 364 U.S. 137, 80 S. Ct. 1392, 4 L. Ed. 2d 1623, this Court made it clear that all the terms and provisions—not merely the pricing sections—of the contracts between independent producers and interstate pipeline companies covering sales of gas in interstate commerce for resale are subject to the jurisdiction of the Federal Power Commission once the service contemplated has been initiated.

> with in this case affect interstate transportation or sale in any respect. That is, the matters dealt with in this case pertain to 'production and gathering of natural gas.' [15 U.S.C.A. §717 (b).]"[20]

If the Kansas Supreme Court had examined the decisions construing 15 U.S.C.A. §717(b), it would have easily ascertained that the matters dealt with in these appeals *do not* pertain to the production or gathering of natural gas. In no less than six cases[21] the courts have said that the production and gathering exemption applies only to the physical activities, facilities and properties used in the production and gathering of natural gas. When a sale in interstate commerce for resale is being made, the exemption *cannot* apply. This conclusion has never been more succinctly stated than in the opinion of the District Court in the *Huber* case (133 F. Supp. 479, 482, fn. 3):

> "In short, as the words are used in Section 1(b) a sale in interstate commerce for resale can never be part of the producing and gathering process."

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[20] It should again be emphasized that Northern does *not* contend the State cannot regulate the physical production of gas, before the sale in interstate commerce for resale.

[21] *Colorado Interstate Gas Co. v. Federal P. Com.*, 324 U.S. 581, 65 S. Ct. 829, 89 L. Ed. 1206; *Interstate N. G. Co. v. Federal Power Com.*, 331 U.S. 682, 67 S. Ct. 1482, 91 L. Ed. 1742, *Federal Power Commission v. Panhandle E. P.L. Co.*, 337 U.S. 498, 69 S. Ct. 1251, 93 L. Ed. 1499; *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035; *Deep South Oil Co. of Texas v. Federal Power Com'n.*, 5th Cir., 247 F.2d 882; *Saturn Oil & Gas Company v. Federal Power Com'n.*, 10th Cir., 250 F.2d 61.

Lower federal courts have had numerous occasions to apply the law enunciated by this Court in the above cited decisions. As expected, all of such courts have uniformly held that the Federal Power Commission has exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale. They have likewise consistently held that, where such a sale is involved, the "production or gathering" exemption of 15 U.S.C.A. 717(b) does not oust the Federal Power Commission of jurisdiction to regulate such sales. See, *e.g.*, *Federal Power Commission* v. *J. M. Huber Corporation*, 133 F. Supp. 479; *J. M. Huber Corporation* v. *Federal Power Commission*, 3rd Cir., 236 F.2d 550; *Deep South Oil Co. of Texas* v. *Federal Power Com'n.*, 5th Cir., 247 F.2d 882; *Saturn Oil & Gas Company* v. *Federal Power Com'n.*, 10th Cir., 250 F.2d 61; *Continental Oil Company* v. *Federal Power Commission*, 5th Cir., 266 F.2d 208.

The all-inclusive jurisdiction of the Federal Power Commission over gas sales contracts between natural gas companies and services to be rendered thereunder includes the exclusive jurisdiction to modify the terms thereof relating to services, thereby assuring protection of the consuming markets [15 U.S.C.A. 717(c)].

Since production is the "act of bringing forth gas from the earth," *Saturn Oil & Gas Company* v. *Federal Power Com'n*, 10th Cir., 250 F.2d 61, 64, it is clear that production is completed prior to the sale of the gas by the producer to Northern. This being true, it necessarily follows that the Kansas Commission orders and rule approved by the Kansas Supreme Court herein pertain to

the sale and purchase of gas and not to the production and gathering thereof.

The adverse effects which the orders and rule herein, if permitted to stand, will have on the operations of Northern and other pipeline purchasers is manifest. As heretofore noted, the Kansas Hugoton Gas Field is, and has been for the past thirty years, one of Northern's most important sources of gas supply. If Northern does not obey such orders and rule, it is subject to heavy penalties under the Kansas statutes. On the other hand, if it does obey such orders and rule it is threatened with suits by Republic Natural Gas Company for money in substantial amounts for alleged breach of contract, since Northern's interstate markets are not sufficient to enable it to purchase the allowable from the wells under the Republic "A" contract and also the allowable under its other 125 contracts in this field.

The applicable principle that should govern this Court in its determination of the reviewability of the final judgments of the Supreme Court of Kansas in these appeals, in conjunction with the recent decisions of this Court cited herein holding that the sale of gas in interstate commerce for resale is under the exclusive regulation of the Federal Power Commission, is well stated by this Court, in the recent case of *Gomillion* v. *Lightfoot*, 364 U.S. 339, 5 L. Ed. 2d 110, 81 S. Ct. 125, decided November 14, 1960. It is there said, on page 117 of L. Ed.2d:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over

when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.' What the Court has said in those cases is equally applicable here, viz., that '*Acts generally lawful may become unlawful when done to accomplish an unlawful end, United States* v. *Reading Co.*, 226 U.S. 324, 357, 57 L. Ed. 243, 254, 33 S. Ct. 90; *and a constitutional power cannot be used by way of condition to attain an unconstitutional result.*' Western U. Tel. Co. v. Foster, 247 U.S. 105, 114, 62 L. Ed. 1006, 1016, 38 S. Ct. 438, 1 A.L.R. 1278." (Emp. added.)

The state objectives sought to be accomplished by the orders and rule were not conservation and/or protection of correlative rights through the ratable taking of gas as approved by this Court in *Cities Serv. G. Co.* v. *Peerless O. & G. Co.*, 340 U.S. 179, 185-186, 71 S. Ct. 215, 95 L. Ed. 190. What the Kansas Commission sought by these orders and rule was to force Northern to increase its purchases of gas from the common source of supply, specifically the Kansas Hugoton Gas Field. These appeals are not analogous to the *Peerless* case, *supra*, *e.g.*, no contract there existed. That case dealt with Cities Service as a producer and operator of an interstate gas pipe line system. Northern, however, is not a producer in the field but only a purchaser. Further, the *Peerless* case, *supra*, did not involve a consideration of the provisions of the Natural Gas Act.

As pointed out by MR. JUSTICE SCHROEDER, 188 Kan. 362, what the Corporation Commission in these cases,

> "• • • purports to do is to set up one proration system, having application to *purchasers*, within a proration system controlling *production* under the Basic Order for the Hugoton Gas Field adopted on the 21st day of March, 1944, *which was designed and declared by the Commission to 'accomplish the purposes for which article 7, chapter 55, General Statutes of Kansas for 1935 was enacted'.*" (R. 160, No. 42,128)

That is to say, the Commission, already having in existence under the basic order for the Kansas Hugoton Gas Field a proration system controlling production, decided that it would set up another proration system having application not to producers but to natural gas company purchasers within said field.

Clearly, the Kansas Commission actions were in violation of the provisions of the Natural Gas Act and in contravention of the decisions of this Court construing the same, which determined that the exclusive jurisdiction to regulate such a sale in all its aspects is lodged in the Federal Power Commission.

That both orders and rule are leveled directly at Northern, there can be no doubt, irrespective of the fact that the rule itself is cast in general terms (R. 92, 102, No. 42,127). The Kansas Commission was well aware of Northern's contractual obligations to Republic Natural Gas Company. Evidence and testimony fully expository thereof were considered by the Commission in promulgating its order directed to Northern dated October 7, 1959. The

record in such proceeding was incorporated in full in the docket in which the Kansas Commission promulgated its rule effective February 8, 1960, and rescinded the earlier order (R. 32-34, No. 42,127).

The Kansas Commission has granted allowables to the Kansas Hugoton Gas Field in excess of total field production by approximately 130 billion cubic feet and the wells in such field connected to Northern, other than the said Republic "A" wells, have been substantially under-produced because Northern simply does not have the inter state markets for gas from such field to permit it to purchase and receive the amount of gas from this field that the Kansas Commission has demanded.

Armed with the knowledge that Northern was obligated to purchase and receive the legal allowables from the Republic "A" wells, the Kansas Commission thought it saw an opportunity to force Northern to receive increased sales from such field by requiring it to purchase ratably amongst all of the wells to it connected therein.

The question presented, including subsidiary questions fairly comprised and discussed herein, becomes more acute and substantial so as to require plenary consideration by this Court of briefs covering the merits of these appeals, when it becomes fully cognizable to this Court that the Hugoton Gas Field comprises one interstate common source of supply of natural gas lying within the boundaries of the States of Texas, Oklahoma and Kansas. It is said to be the largest known reserve of natural gas in the world. The

largest portion of the field is located in Kansas. This portion of such field is commonly known as "Kansas-Hugoton." The portion in Oklahoma is called "Guymon-Hugoton," and that part in Texas, "Texas-Hugoton." *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 724, 222 P.2d 704; *Interstate Oil Compact Quarterly Bulletin*, Volume XI, December 1952, Nos. 3 and 4, page 12, and "*Conservation of Oil and Gas*, 1948," by Mineral Law Section of the American Bar Association, 165-183, 403-408. While the Hugoton Gas Field is a single interstate common source of supply of natural gas, the production in the portion of the field in Texas is regulated by the Railroad Commission of that state. Article 6008, *Vernon's Annotated Texas Civil Statutes*, 10 through 22; Articles 6008a-2, 6049c-7, and 6049d-4. Production in that portion of the field in Oklahoma is regulated by the Corporation Commission of Oklahoma under 52 O.S.A. 21 through 35, 231 through 233, and 236 through 247. Production in the portion of the field in Kansas, on the other hand, is regulated by the Corporation Commission of Kansas under G.S. 1949, 55-701 through 713, and G.S. 1959 Supp. 55-703, 706 and 711.

It thus is made apparent, as pointed out by this Court in *F.P.C.* v. *Transcontinental Gas Corp.*, *supra* (page 390 of L.Ed.2d), that one of such producing states in this common source of supply might wish to prolong its gas reserves for as long as possible while another might desire to deplete the field as rapidly as possible. The rule, as stated by this Court in *U. S.* v. *Louisiana*, 363 U.S. 1,

33, 4 L. Ed.2d 1025, 80 S. Ct. 961, that a land boundary between two states marks the place where the full sovereignty of one state ends and that of another begins, points up very clearly the impact on interstate marketing of gas from this single interstate common source of supply when one state attempts to conserve its gas and another decides to force speedy depletion of this exhaustible natural resource.[22]

If each gas producing state has the jurisdictional right, either exclusively or concurrently with the Federal Power Commission, to control such sales, there must necessarily result a lack of uniformity in the construction or modification of the controlling gas sales contracts, resulting in complete confusion and the stripping of all vitality from the jurisdiction of the Federal Power Commission over sales of gas in interstate commerce for resale.

The orderly administration of the Natural Gas Act requires that this Court take jurisdiction in these appeals and strike down this latest attempt by the State of Kansas

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[22] Analogous to this situation is the competition between Oklahoma and Kansas to fix prices for gas produced and sold in interstate commerce from the Hugoton Field. Oklahoma's price fixing efforts were stricken down by this Court in *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U.S. 43, 75 S. Ct. 576, 99 L. Ed. 866, while the Kansas effort to fix an even higher price was stricken down by this Court in *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 355 U.S. 391, 78 S. Ct. 381, 2 L. Ed. 2d 355.

to regulate sales of natural gas in interstate commerce for resale.

Respectfully submitted,

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December, 1961.

APPENDIX

APPENDIX A

No. 42,128

NORTHERN NATURAL GAS COMPANY,
Appellant,

v.

STATE CORPORATION COMMISSION,
Appellee.

SYLLABUS BY THE COURT

1. Gas—*Powers of Corporation Commission—Ratable Taking by Purchaser.*

The provisions of G.S. 1959 Supp., 55-703 are considered and held to be sufficient to give the Corporation Commission powers to pass rules to insure the fair and equitable taking of natural gas from a common source, and in such an attempt to provide for the ratable taking of natural gas by a purchaser.

2. Same—*Order of Commission—As to Ratable Taking by Purchaser—Validity.*

It is further decided that such an order as described in the first paragraph hereof did not impair the obligation of a contract possessed by the purchaser or impinge upon other constitutional rights of the purchaser.

3. Same—*Order of Commission—As to Ratable Taking by Purchaser—Federal Power Commission's Authority Not Impaired.*

It is also further decided that the order of the Commission as to the ratable taking of natural gas concerns only the production and gathering of gas and in no way impairs the control of the Federal Power Commission over the transportation of natural gas in interstate commerce under the federal Natural Gas Act, 15 U.S.C.A. §717 *et seq.*

Appeal from Finney district court; ROLAND H. TATE, judge. Opinion filed June 10, 1961. Affirmed.

Mark H. Adams II of Wichita argued the cause, and *Mark H. Adams, Charles E. Jones, William I. Robinson, J. Ashford Manka, Clifford L. Malone, John S. Seeber* and *Floyd E. Jensen* of Wichita; *Lawrence I. Shaw, F. Vinson Roach*, and *Patrick J. McCarthy* of Omaha, Nebraska; *Ray H. Calihan, Logan N. Green, Daniel R. Hopkins* and *Ray H. Calihan, Jr.*, of Garden City were with him on the briefs for the appellant.

Charles C. McCarter, general counsel, argued the cause, and *S. F. Fleeker*, assistant general counsel, was with him on the briefs for the appellee.

The opinion of the court was delivered by

JACKSON, J.: The appellant Northern Natural Gas Company began a judicial review action in the court below to review an order of the Corporation Commission directing it to take gas ratably from all gas wells in the Kansas Hugoton Gas Field to which its lines were connected including the gas wells owned by Republic Natural Gas Company with which company it had a special contract as to the purchase of gas. The district court affirmed the order of the Commission, and the appellant brings the matter to this court on an appeal from the district court's decision.

Throughout the remainder of this opinion we shall refer to the above parties as "Northern," "Republic," and the "Commission."

For many years Northern and Republic have been parties to a contract under which Northern agreed to take and pay for a sufficient amount of natural gas to supply 60% of the supply needed by Northern to satisfy the needs of its customers in a certain area in Iowa and Nebraska. The exact location of this area in Nebraska and Iowa is not important, but it is referred to in the briefs as the Omaha District. This contract covers only some 144 wells

owned by Republic and in the briefs this group of wells is referred to as the "Republic A" wells.

The above contract has been before this court in the former case of *Northern Natural Gas Co. v. Republic Natural Gas Co.*, 172 Kan. 450, 241 P.2d 708, in which opinion a more detailed account of the contract may be found.

There can be no question that Northern is engaged in the interstate transportation of natural gas by pipe line for sale in states other than Kansas, as defined in the Natural Gas Act. In the last case mentioned, the question at issue was the amount of gas which could be lawfully produced under the above contract and regulations of the Commission. The important part of the syllabus of the case just cited reads: "An operator of gas wells . . . as to the amount of gas he can produce from the wells . . . governed by the allowables for such wells made by the commission for the time in question and not by slightly less than three times such allowables."

Another case which is connected with this same contract between Republic and Northern is that of *Republic Natural Gas Co. v. State Corporation Commission*, 173 Kan. 172, 244 P.2d 1196. Those interested in an account of the manner of establishing proration allowables for gas wells in the Hugoton field are directed to the opinion in the last mentioned case. The case affirmed the Commission in making an order refusing to reinstate canceled "underages" of certain gas wells owned by Republic. The canceled underages had been canceled according to the rules of the Commission applying to the entire Hugoton field.

As early as 1938, Northern had begun to purchase additional gas supply in the Hugoton field in addition to the Republic "A" wells. In 1949, Northern entered into a gas purchase contract with Cities Service Oil Company. There-

after, Northern purchased other gas supply and now owns some 125 gas purchase contracts.

These gas purchase contracts cover a total of some 1,100 gas wells in the Hugoton field. Such contracts contain provisions for the ratable taking of gas between all gas wells with the exception that Republic "A" wells are specifically excepted from the provision for ratable taking and are given preference where the demand for gas does not equal the allowables for all of the wells. A copy of such contracts [*sic*] is contained in the abstract but need not be reproduced in this opinion.

Northern's position is quite clearly and forcefully stated in the following quotation taken from its brief:

> "As Northern has interpreted its commitments under its gas purchase contracts in such field, when Northern's market requirements from the field are less than the total allowables assigned to the wells connected to Northern, Northern's contractual commitment (as previously interpreted by the Court) under the Republic "A" contract is first deducted from Northern's gas requirements and allocated to the Republic "A" wells. The balance of Northern's requirements is then allocated ratably to all other wells to it connected in such Field."

Northern further tells us that from 1944 until 1958, Northern was largely able to take ratably from all wells connected with its lines, but it seems to concede that during 1958, it took gas from Republic "A" wells at a much greater rate than from the rest of the wells connected to its gathering lines. In January, 1959, the Cities Service wells connected to Northern's lines had a monthly allowable of 2,084,874 Mcf. They had an underage of 11,411,727 Mcf., and 123,711 Mcf. of these underages were canceled by the Commission under its general rules as being underproduced in excess of six times the January

current allowable. Northern's other connections aside from Republic "A" wells had a January current allowable of 9,309,441 Mcf. and a total underage of 48,604,070 Mcf.

The net status of these wells was 522.09 percent under produced, and they suffered cancellation of 409,393 Mcf. of the aforementioned underage.

In contrast, Republic "A" wells had a current January allowable of 2,674,390 Mcf. and an overage of 114,858 Mcf. They were overproduced 4.29 percent in that particular month.

Northern makes no claim that it would not have been possible to take gas ratably from all of its wells. It only claims that the contract with Republic gives it the right to prefer Republic "A" wells.

On May 27, 1959, the Commission on its own motion took notice of the above situation and issued an order to Northern to show cause why it should not take ratably from the wells to which it is connected in the Hugoton field in Kansas. The hearing was set first on June 26, 1959, but later continued to July 24, 1959 and the order appealed from was issued October 7, 1959.

At the hearing before the Commission, an expert witness testified as follows:

> ". . . I have expressed an opinion that there is drainage occurring. Our studies indicate that if the wells are produced with the same percent of allowable production or of net allowable production, then the wells will be ratable, and correlative rights will be protected. There are two ways of accomplishing this currently in the Hugoton Field. One is to raise the total of Northern Natural's takes up until they are ratable with the Republic 'A' group, and second would be to lower Republic 'A' by curtailing their production, so they will become ratable with the balance of the field."

[APPENDIX]

We do not read the record to show that there is any contention but that drainage was occurring, and that the underproduced wells were losing the right to produce gas from the common source of supply to the great damage of the owners of the wells in the loss of their correlative rights.

While the members of this court make no claim to be experts in the science of the production of natural gas, we believe that the court may take judicial notice of the fact that where natural gas is within the earth in one common source and is under pressure, if one gas well is allowed to take gas, this will result in the pressure being lowered around the vicinity of this gas well so that the gas in the common source will tend to drain or rush to the vicinity of the well taking gas. The result will be that the other wells in the common field or source will be able to produce much less gas and the owners of such wells will have suffered a definite loss.

It should be noted at this time that shortly after the issuance of the order of the Commission dated October 7, 1959, directed only to Northern and which is appealed from in this present proceeding, the Commission, after due notice and hearing, issued a general rule applicable to all takers of natural gas from the Hugoton gas field and requiring that all takers of gas take ratably from the wells to which they are connected. Northern's appeal from that general order is to be found in *Northern Natural Gas Co.* v. *State Corporation Commission*, 188 Kan. ____ P.2d ____.

In attempting to sustain its position in the present case, Northern first contends that our state Natural Gas Act does not provide for ratable taking; that the act applies only to producers of gas; that Northern is a purchaser of gas and a natural gas company engaged in interstate commerce. It refers to section 55-703, G.S. 1959 Supp., and

stresses the first part of the section which refers to producers. But Northern has ignored the latter part of the section wherein the following language is found:

> "The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent."

In Summers on *Oil and Gas*, Vol. 1A, sec. 103.1 p. 139, wherein the eminent author is dealing with ratable taking of oil and gas, that part of section 55-703 set out above is noted and the author concludes as follows:

> "The Kansas gas conservation act authorizes the state corporation commission to so regulate the taking of gas from any common source of supply as to prevent inequitable and unfair taking. This act does not expressly state that purchasers of gas in the common source of supply may be required to take ratably from all wells with which their pipe lines may be connected, *but unless the commission has such authority it cannot prevent inequitable and unfair taking.*" (Italics supplied)

It will be noted that the Commission is authorized to make rules and regulations for the purpose of accomplishing the results to which the Commission is directed; and that such rules and regulations have the force and effect

of law when filed in the office of the revisor of statutes (G.S. 1949, 77-410).

In search of Commission's Rule 82-2-101, which has been so filed, we find the following: "Taker: See purchaser." And in the same rule, purchaser is defined as follows:

> "Purchaser shall mean any person who directly or indirectly purchases, transports, takes, or otherwise removes production to his account from a well, lease or common source of supply. Purchaser is usually considered to be the person holding the division order." (Italics supplied) (*Sic*)

We believe Northern is mistaken in arguing that the above statute and the rules made thereunder do not apply to a purchaser of natural gas. We are only more convinced that the legislature had this in mind, by the fact that natural gas cannot be produced unless someone is ready to buy it, it cannot be stored in a tank on the lease. Therefore, as Professor Summers says, the object of the quoted provisions of section 55-703 cannot be accomplished unless the taker or purchaser can be controlled. We believe the statute is sufficient to reach Northern.

We note that in its brief, the Commission has directed attention to certain language in the opinion of *Republic Natural Gas Co. v. State Corporation Commission*, supra. While the whole opinion in that case is in line with what we are now deciding, the precise question now before us was not there involved.

The second objection to the validity of the order of the Commission appealed from is sweeping in its coverage and reads as follows:

"II

"Said order as approved by the trial court is arbitrary, unreasonable and discriminatory, has no relation to proration or conservation of gas, burdens interstate commerce and takes appellant's property and contract rights, all in violation of the commerce clause, the contract clause and the fourteenth amendment to the federal constitution, and the Kansas Bill of Rights, sections one, two and eighteen, and section seventeen, article two of the Kansas constitution."

Despite the sweeping indictment of the order, Northern really seems to simply argue that the contract has established the correlative rights of the parties, and that therefore, the state is powerless to prevent waste and drainage of gas as long as the monthly allowables are not unlawfully exceeded.

We would direct attention to a provision of the contract upon which Northern relies, and which reads:

"SECTION 2. *Commission Jurisdiction*. This contract is subject to all valid legislation with respect to the subject matter hereof, either State or Federal, and to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction."

We cannot agree with the argument that the monthly allowable is the whole story. Certainly, the wells attached to Northern and apart from Republic "A" are losing gas to Republic "A" and possibly to any other taker who is taking gas at a greater rate than Northern is allowing gas to be produced from these wells.

It would seem that ratable taking in the production of natural gas has been late in coming before this court for approval. The Supreme Court of Oklahoma upheld an order of the Corporation Commission of that state pro-

viding that a purchaser of natural gas must take gas from a producer having no contract with the purchaser and must also take ratably from the aforesaid producer; see *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 203 Okla. 35, 220 P. 2d 279, affirmed on appeal, 340 U.S. 179, 95 L.Ed. 190, 71 S. Ct. 215.

It would appear to us that the opinions of the Supreme Court of Oklahoma and of the Supreme Court of the United States in the above case foreclose any of Northern's arguments in the case at bar. There was a matter of contract involved in the Peerless case. Cities Service undoubtedly thought they had a right to take gas from the wells from which it had contracted to buy gas, and that it had no duty to contract with Peerless. But it was held that the state might prevent drainage of gas from the Peerless wells despite the contracts held by Cities Service.

Certainly, in view of the above quoted provision of the contract between Northern and Republic, there has been no impairment of the obligation of contract in this case or any other impairment of constitutional right.

Lastly, Northern contends that the order of the Commission impinges upon the authority of the Federal Power Commission under the Natural Gas Act, 15 U.S.C.A. §717 *et seq.*

As above noted, we are quite well aware that Northern is engaged in the transportation and sale of natural gas in interstate commerce by pipe line. We do not believe, however, that the matters dealt with in this case affect interstate transportation or sale in any respect. That is, the matters dealt with in this case pertain to "production and gathering of natural gas." (15 U.S.C.A. §717(b)).

It should again be emphasized that the Commission's order did not direct Northern as to the amount of gas which it should take, it only directed that the amount

Northern needs shall be taken ratably from all the gas wells which Northern serves. Northern agrees that it could do this, but says it would have to give up its contracted preference to Republic "A" wells. Everyone would be happy if Northern would take the entire monthly allowable from all of the wells served. Northern says that in the near future it believes that it will be able to do this very thing.

We believe that the state may regulate the production of natural gas and the gathering of the same to the extent necessary to insure that the gas under one owner's land will not be drawn off by his neighbor, and that his neighbor cannot plead a contract with a third person to give him a right to drain gas from his neighbor.

All of the matters contained in Northern's brief have been fully considered, and we find that the order appealed from must be affirmed. It is hereby so ordered.

SCHROEDER, J., dissenting: The Commission by its order directed to Northern assures it has authority under G. S. 1949, 55-703, as amended, to control and regulate *purchases* of gas by Northern engaged in the interstate transportation of gas. This [illegible] beyond the authority of the statute.

What the Commission [illegible] and in the companion case [illegible] is to set up one proration system, having as between purchasers, within a proration system controlling production under the Basic Order for the Hugoton Gas Field adopted on the 21st day of March, 1941, *which was designed and declared by the Commission to accomplish the purposes for which article 7, chapter 55, General Statutes of Kansas for 1935 was enacted.*" Basic Proration Order for the Hugoton Gas Field, paragraph m. (Emphasis added.)

By the Commission's order dated October 7, 1959, Northern was directed to take gas ratably from its con-

nections in the Kansas Hugoton Gas Field (Case No. 42,128), and by the Commission's order promulgating Rule 8-2-219 (Case No. 42,127), all companies *purchasing gas* from a common source of supply under proration by the Commission are required to take gas in proportion to the allowables from all the wells to which each is connected.

The Basic Proration Order for the Hugoton Gas Field, as amended, and in effect at times material, by a system of proration, controls the *production* of gas in the Hugoton Field. The end sought in fixing *production quotas* was to enable each developed lease to currently produce its daily allowable so that ultimately such developed lease would have an opportunity to produce approximately the amount of gas which underlies such lease. It recognized the available production of the wells in the Hugoton Field was far in excess of the market demand, and found:

> "f. That since there exists disproportionate *production* from the wells and leases in said field which impairs the correlative rights of many of the owners of developed leases, it is necessary for the Commission to take jurisdiction and to prescribe *regulations for the production of gas* from said wells and others that may be hereafter completed in said field to the end that each person, firm, or corporation *having the right to drill into and produce natural gas from said field may take therefrom only such proportion of the amount that may be produced therefrom without waste* as will permit each well or developed lease *to produce* ultimately at least approximately the amount of gas underlying the land or lease on which such well is located and *currently produce proportionately* with the other wells in said field . . ." (Emphasis added.)

The basic order adopted a formula which was said to have a reasonable relation to the prevention of waste.

to the prevention of inequitable and unfair *production of gas from the common source of supply*, and to the prevention of unreasonable discrimination in favor of one *producer* in said field and against another *producer* therein (paragraph m). The order directed that there be held two market demand hearings for each year (paragraph n) to determine the market demand for natural gas from the Hugoton Field for the next succeeding proration periods, and directed the preparation and promulgation of a new schedule of *production* allowable for the wells in said field, *based upon the determination made as a result of the market demand hearing* (paragraph o).

The record presented discloses that pursuant to paragraph "n" of such basic proration order, two market demand hearings for each year were and are held by the Commission, and market demand orders were and are issued for six-month periods (October 1 to March 31 and April 1 to September 30), in addition to which monthly *proration or allowable orders were and are issued for each month spreading and allocating the market demand and fixing the monthly allowables assigned to each of the producing gas wells in said field.*

The record discloses that for the entire period from April, 1944, through February, 1958, there were no important differences between the ratable purchases by Northern from Republic "A" wells and other wells to which it was connected. The difference in ratio was less than one times the January allowable for essentially the entire period.

However, in the spring of 1958, a wide difference in Northern's purchases appears between the Republic "A" wells and the others.

The reason stated to the Commission and assigned by Northern for this difference is:

". . . First, as the Commission is well aware, *allowables granted by the Commission to the field have*

exceeded the total field production by approximately 130 billion cubic feet and the wells connected to Northern, other than the Republic 'A' wells, have become substantially underproduced. Second, is the fact that Northern has been seriously delayed in expanding its system into new markets for gas by reason of the failure of the Federal Power Commission to issue the necessary Certificates of Public Convenience and Necessity . . ." (Emphasis added.)

Testimony on behalf of Northern was that given sufficient time it would be able to conduct its operations in such a way that the taking from the wells to which it was connected would be ratable. This was based *on the assumption that the Commission's future allowable assignments will be realistic*, and on the further assumption that the necessary expansion certificates will be issued to Northern by the Federal Power Commission.

It must be recognized that Northern's Republic "A" contract is subject to all valid legislation with respect to gas purchases in the Hugoton Field, either state or federal, and to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction. (See, *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 478, 241 P.2d 708.)

The testimony on behalf of Northern was that as far as facilities were concerned, it was not physically impossible for Northern to take gas ratably from the Republic "A" wells and all other wells connected to its system. The evidence further disclosed that if the markets were sufficient so that Northern could take the current allowables from the Republic "A" wells and also take the current allowables from all other wells connected to it, then Northern's take would be ratable as between all wells connected to its system. In other words, *when the market conditions are at the same level as the allowables then the same re-*

turn of take would exist between the Republic "A" wells and all other wells to which Northern was connected.

Theoretically, when these facts are considered in the light of the Basic Proration Order for the Hugoton Field and the statute pursuant to which it was promulgated, if the Commission is not derelict in its duty *to correlate allowable production with the market demand*, all wells of necessity would be *produced* ratably without supplementation by any order or rule to control the *purchasers* of gas in the Hugoton Field. Taking into consideration the entire history of Northern's purchases of gas in the Hugoton Field starting from April, 1944, the above theory seems to have practical application.

It is readily apparent that any effort to control the purchase of gas, which of necessity on the facts before the court in the instant case is limited to those wells connected to Northern's gathering system and pipe line, cannot protect the correlative rights of all producers from the common source of supply in accordance with the mandate of the statute. It fails to take into consideration those wells, potentially capable of production, which have no market for their gas, and the differential in markets among the various purchasers of gas from the common source of supply. Therefore, if the Commission fails to exercise its power *to correlate production with demand*, it cannot accomplish the mandate of the statute, and resort to a method which requires *the purchasers* of gas in the Hugoton Field to take ratably from the wells to which each is connected is little more than a futile gesture.

It must be assumed the legislature was aware of the situation regarding the production and development of gas in this state when 55-703, *supra*, was first enacted in 1935, and when subsequent amendments were made thereto, but it did not expressly authorize the Commission to require purchasers of gas in the common source of supply to take ratably from all wells to which their pipe line

was connected. It undoubtedly felt the control of production was sufficient to accomplish the purposes for which the statute was enacted.

An analysis of G. S. 1949, 55-703, as amended, (now G. S. 1959 Supp., 55-703) will disclose the Commission has no jurisdiction over purchases of gas by an interstate pipe line company. Our gas conservation law is Chapter 55, Article 7, and is entitled "PRODUCTION AND CONSERVATION OF NATURAL GAS." The applicable section of this statute is 55-703, *supra*. In pertinent part it reads:

> "[1] Whenever the available *production* of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, *then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced* without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. [2] The commission shall so *regulate the taking of natural gas from any and all such common sources of supply* within this state as to prevent the *inequitable or unfair taking from such common source of supply* by any person, firm or cor-

poration and to prevent unreasonable discrimination in favor of any one common source of supply as against another and *in favor of or against any producer* in any such common source of supply . . ." (Emphasis and numbers added.)

In both cases the Commission relies upon the above quoted portion of the statute marked [2], categorically stating this is the source of its jurisdiction.

An examination of this portion of the statute, and those portions thereof which have been italicized, makes it clear that *the taking referred to*, over which the Commission is to have regulatory jurisdiction under certain circumstances, *is from the common source of supply*. As applied to the Kansas Hugoton Gas Field the common source of supply would be the so called "Hugoton P. ... Zone," or the producing horizon described as gas encountered at an average depth of from 2700 to 2800 feet below the surface within the Kansas Hugoton Gas Field. Therefore, the taking referred to is not a taking from the wellhead, or from a producer, or from the end of a gathering system owned by the producer some miles from the wellhead, but the taking referred to is from the common source of supply.

It must be noted the phrase "person, firm or corporation" used in both the first and second portions of the quoted statute, is defined in the first portion as one "*having the right to produce natural gas.*" (Emphasis added.) It is difficult to believe the legislature intended that on the one hand such expression referred to a producer, and on the other hand to a purchaser.

The court in *White Eagle Oil Co. v. State Corporation Comm.*, 168 Kan. 548, 214 P.2d 337, quotes a portion of the first sentence of the section of the statute in question which it construes as being the statutory mandate or declaration of public policy with regard to *production*.

While the Commission's general rules and regulations, in Rule 92-2-101, under the definition of "taker" refers the reader to the definition of "purchaser," the rules do not give the Commission jurisdiction to regulate purchases, unless such authority is found in the statute. In other words, if the statute does not confer power upon the Commission to regulate the purchases of gas, it cannot confer such power upon itself by the adoption of a rule.

The State Corporation Commission of Kansas has a limited jurisdiction. It posseses no powers not given it by statute. (*Bennett* v. *Corporation Commission*, 157 Kan. 589, 596, 142 P.2d 810; *Manhattan Co.* v. *Commissioner*, 297 U.S. 129, 80 L.Ed. 528, 56 S.Ct. 397; 24 Am. Jur., Gas and Oil, §144, p. 628; and see, *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U.S. 627, 77 L.Ed. 1410, 53 S.Ct. 768.)

On those several occasions over the life of the statute when this court has been called upon to construe 55-703, *supra*, and its companion sections, it has consistently construed such act as a statute giving authority to regulate production, and not purchases. (*Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, supra; and *Republic Natural Gas Co.* v. *State Corporation Commission*, 173 Kan. 172, 244 P.2d 1196.)

In *Republic Natural Gas Co.* v. *State Corporation Commission*, supra, the court in substance said that the continuing duty on the part of the Commission was to cause the *production* of gas from any well to be ratable, in accordance with the provisions of the statute and the basic order; and that no operator or producer had any vested right to produce from any well more gas in any month than was assigned it as its allowable, the entire matter of *producing gas* from a well being subject to the provisions of the basic order and the statute. In other words, under 55-703, *supra*, to "take" gas means to "produce" gas. The

essence of the gas conservation statute is that it operates on the operator or producer of the well.

In construing our oil conservation statute, which is very similar to our gas conservation statute, this court in *State, ex rel.*, v. *Sinclair Pipe Line Co.*, 180 Kan. 425, 304 P.2d 930, stated:

> "The statutes with reference to waste are G. S. 1949, 55-601 to 55-608, inclusive. The production of crude oil in such a manner as to constitute waste is prohibited by G. S. 1949, 55-601, and made a crime by G. S. 1949, 55-607. *The statute refers only to production.* Sinclair, as we have demonstrated, is engaged strictly in interstate transportation of crude oil. The Oklahoma statute on waste is almost identical to ours. In speaking of that statute, the supreme court of the United States held in *Champlin Rfg. Co.* v. *Corporation Commission*, 286 U.S. 210, 76 L.ed. 1062, 52 S.Ct. 559:
>
> "'It is clear that the regulations prescribed and authorized by the Act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products'." (pp. 437, 438.) (Emphasis added.)

It is significant to note that the oil statute, G. S. 1949, 55-603, states in part: ". . . *any person having the right to drill into and produce* oil therefrom may *take* therefrom . . ." (Emphasis added.) (See, Two Cases on Conservation, Vol. 6, J.B.K. p. 149, by H. H. Lesar.)

It is apparent that heretofore the Commission itself has always construed the statute in question as one authorizing the regulation of production, and not purchases. In paragraph "f" of the Basic Proration Order for the Hugoton Gas Field the Commission found "The present and past *production* from the wells in said field is and has been *inequitable* and *unfair*." (Emphasis added.) At another place in paragraph "f" the Commission found "it is neces-

sary for the Commission to take jurisdiction and to prescribe regulations for the *production* of gas." (Emphasis added.)

In *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 203 Okla. 35, 220 P.2d 279, the Oklahoma Supreme Court directed Cities Service, a purchaser of gas, to take gas ratably from other wells in a given field. From this decision the Commission argues that ratable take statutes do in fact apply to purchasers as well as producers.

It must be noted in the state of Oklahoma the legislature has enacted a *common purchasers' statute*, requiring that purchasers of gas shall purchase and transport natural gas from each person or producer ratably, in proportion to the average production, and prohibits such common purchasers from discriminating in price or amount for like grades of natural gas or facilities as between producers or persons. (52 Okl. St. Ann., §23.) Also, the legislature of Oklahoma in its conservation of oil and gas *statute* has defined the term "taker" to include a purchaser of natural gas as follows:

> "(i) The term 'Taker' shall include any person, who, acting alone, or jointly with any person or persons, is directly or indirectly purchasing or transporting by any means whatsoever or otherwise removing oil or gas from any common source of supply in this State. Laws 1947, p. 326, §1." (52 Okl. St. Ann., §86.1.)

It is clear the Kansas Corporation Commission cannot look to the statutes of other states, or to the judicial construction of such statutes, for power to control purchasers of gas in Kansas under the provisions of G. S. 1949, 55-703, as amended.

Both the statute and the Basic Proration Order for the Hugoton Gas Field purport to give the Commission jurisdiction over the regulation of production only. In other words, the "taking" which must be ratable under

the statute and the basic order is the *production* of gas from the common source of supply, not the *purchasing* of gas. By a mandatory direction from the legislature the Commission has jurisdiction over production, so that such production will neither be inequitable nor unfair. The "Order" (Case No. 42,128) and the "Rule" promulgated by the Commission (Case No. 42,127) here under review which is directed to purchasers, rather than operators or producers, and seeking to regulate the purchase of gas, or the manner of making such purchases after production has ceased, rather than to regulate the production itself, are in my opinion invalid because they go beyond the jurisdiction conferred upon the Commission by the statute.

APPENDIX B

No. 42,128

NORTHERN NATURAL GAS COMPANY
Appellant
v.
STATE CORPORATION COMMISSION
Appellee

OPINION DENYING MOTION FOR REHEARING

Appeal from Finney district court; ROLAND H. TATE, judge.

Opinion filed August 31, 1961. (For original opinion of affirmance see *ante* p. 355, 362 P.2d 599.)

The opinion of the court was delivered by

JACKSON, J.: In its motion for rehearing Northern disclaims the position of contending that our gas statute G.S. 1959 Supp. 55-703 does not require ratable production

of gas from a common source. It says the question is whether the statute also requires ratable purchases of gas. It then warns the court not to invade the jurisdiction of the Federal Power Commission by dealing with purchasers, citing *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 74 S. Ct. 794, 98 L.Ed. 1035; *Natural Gas Co.* v. *Panoma Corp.*, 349 U.S. 44, 99 L. Ed. 866, 75 S. Ct. 576; *Deep South Oil Co. of Texas* v. *Federal Power Com'n.*, 247 F.2d 882; *Saturn Oil & Gas Company* v. *Federal Power Com'n.*, 250 F.2d 61, cert. denied 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542; *Cities Service Gas Co.* v. *State Corporation Commission*, 180 Kan. 454, 304 P. 2d 528, reversed 355 U.S. 391, 2 L. Ed 2d 355, 78 S. Ct. 381; and *Cities Service Gas Co.* v. *State Corporation Commission*, 184 Kan. 540, 337 P.2d 640.

We had read those cases before the opinion in this case was announced, and we believe those cases all dealt with the question of the power to regulate the price of gas. As we tried to point out in the opinion as filed, this case in no way involves the price of gas. Northern studiously avoids that fact. Moreover, the ratable taking order does not regulate the total amount of gas which Northern may take. We fail to see how the order affects interstate commerce in any way.

Northern magnanimously states that the state may control the ratable production of natural gas, but fails to inform us how this can be done unless the producer can find a "taker" for his gas.

It is not important in this case that the purchaser has a contract to purchase the gas at a price, which we will assume is subject to the regulation and jurisdiction of the Federal Power Commission, but the only important matter is that the "taker" take gas so that it may be produced. This case involves nothing to our knowledge which has anything to do with the price paid by the purchaser for gas, nor how much gas he buys. The only matter here involved is whether the taker must take ratably from all

wells to which he is connected and thus preserve the rights of the land owners.[1] We again refer to the statement of Professor Summers of the University of Illinois School of Law set out in the original opinion to show that ratable production can not be accomplished unless the taker will take gas ratably.

Northern has in this case cast some reflection upon the increase of allowables in 1958 by the Kansas Commission. The record contains no facts concerning this action of the Commission. But we must assume that the Commission believed that the market was sufficient to warrant the increase. Moreover, if we are justified in taking judicial notice of facts, we must also assume that the Kansas allowables were not greater than the Oklahoma allowables. And we notice that it was generally thought to be a fact that drainage of gas was occurring from the Kansas Hugoton field to that part of the field in Oklahoma.

Thus, in 1958, the Commission may have been, in a roundabout way, endeavoring to set up ratable taking as between Kansas wells and Oklahoma wells by increasing the allowables of the Kansas wells.

Of course, none of this is involved in the record of the case before us. However, we may direct attention to the news story on page 54, in *Newsweek* for July 10, 1961, entitled *Natural Gas: Two Straws*. It is there noted that the Hugoton field covers some 4.1 million acres in Kansas, Oklahoma and Texas; that most of the estimated 300 trillion cubic feet of gas in the field lies under Kansas soil, but that Oklahoma supplies the major share of the 2 million cubic feet pumped daily northward through the pipe lines.

The motion for rehearing is denied.

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[1] Reference might again be made to that part of G.S. 1959 Supp. 55-703 which is quoted in the original opinion, and to the discussion in the late case of *Renner* v. *Monsanto Chemical Co.*, 187 Kan. 158, p. 170, 354 P.2d 326, relating to the proration and ratable taking as to oil.

Schroeder, J., is of the opinion the judgment of the trial court should be reversed, and therefore dissents.

APPENDIX B(a)

NEWSWEEK Magazine

July 10, 1961

Natural Gas:

TWO STRAWS

The biggest border feud since Missouri slaveholders tried to take Kansas away from the abolitionists a century ago was shaping up last week over a vast, $30 billion pocket of natural gas that lies under 4.1 million acres of prairie land in Southwest Kansas, the Oklahoma panhandle, and northern Texas. Most of the estimated 300 trillion cubic feet of gas in the Hugoton field, as it is known, lies under Kansas. But Oklahoma supplies the major share of the daily 2 million cubic feet that is pumped northward through pipelines—and Kansans don't like that at all.

"It's as though there were two straws in the same chocolate soda," a Kansas official explained last week. "If the soda is sucked up faster through one straw, the man on the end of that straw is going to get more than his share."

In an effort to put a crimp in the Oklahoma straw, the Kansas Supreme Court last month ruled that the Northern Natural Gas Co., whose pipelines carry gas from all sections of the Hugoton field, must pump equally from all their wells. Not only would the ruling mean another $5 million to $10 million annually for well owners in the Sunflower State, but it would stop what Kansans claim is

a steady seepage of their reserves into the Oklahoma portion of the field.

UNFAIR: Alf Landon, the normally calm-speaking ex-governor who was the Republican Presidential candidate in 1936, showed just how riled up Kansans are about what they consider a misuse of the state's natural resources. "To me, corporations which persist in wasting natural gas . . . and persist in violating the rights of Kansas landowners and producers, all to the detriment of the best interests of Kansas, have no real sense of responsibility," he said.

Northern Natural Gas Co., arguing that its pumping pattern had been approved by the Federal Power Commission, last week asked the Kansas court to reverse its decision.

Whatever the outcome, it seemed certain that the border feud was headed for the U. S. Supreme Court. As chairman Harold Freeman of the Oklahoma Corporation Commission put it: "The Kansas Supreme Court doesn't have jurisdiction in this situation. More than 90 per cent of the gas leaving the Oklahoma portion of the Hugoton field goes into interstate commerce."

APPENDIX C

(Omitting Formal Parts)

JOURNAL ENTRY

Now on this 8th day of April, 1960, there comes on for consideration and determination by the Court, the petition of Northern Natural Gas Company for Judicial Review of the October 7, 1959, Order of the State Corporation Commission directing the petitioner to take gas

ratably from the Kansas Hugoton Gas Field. The petitioner appears by its attorneys of record, and the respondent, State Corporation Commission, appears by its attorneys of record.

Whereupon, the Court, having examined the files and records herein, and having heard the argument of counsel on March 15, 1960, finds that the said order of the State Corporation Commission, dated October 7, 1959, directing petitioner to take gas ratably from the Kansas Hugoton Gas Field is lawful, valid, and reasonable, and should be affirmed.

It Is, Therefore, by the Court Considered, Adjudged and Ordered: That the October 7, 1959, Order of the State Corporation Commission directing Northern Natural Gas Company to take gas ratably from the Kansas Hugoton Gas Field is affirmed.

By the Court,
/s/ Roland H. Tate,
Judge

APPENDIX D

(Omitting Formal Parts)

ORDER.

Now on this 7th day of October, 1959, the above-entitled matter comes before the Commission for further consideration and final disposition. The Commission (Harry G Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners), having examined the record, exhibits, files and briefs of counsel, and being fully advised in the premises, finds:

1. That Northern Natural Gas Company is not taking ratably from its connections in the Kansas Hugoton Gas Field which is a common source of supply.

2. That Northern Natural Gas Company purchases part of its gas from Republic Natural Gas Company under a contract which shall be designated as the "Republic A" contract. That this "Republic A" contract requires Northern Natural Gas Company to take certain quantities of gas or pay for it even if not taken. That this "Republic A" contract has a further provision making it subject to all valid legislation and all valid orders, rules, and regulations of duly constituted authorities having jurisdiction.

3. That the wells dedicated by Republic Natural Gas Company to the fulfillment of this "Republic A" contract have been produced at a much greater rate (percentage of allowables) than other wells connected to the Northern Natural Gas Company system. That the disparity in rates of production has been so great that many wells have accumulated sizeable underages while the wells producing under the "Republic A" contract are producing the current allowable and some are overproduced. That this is not ratable taking from a common source of supply.

4. That under the Gas Conservation Laws of the State of Kansas, G.S. 1949, 55-703, the Commission is given the duty and power to "so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. * * *" This is also reflected in the Basic Order for the Hugoton Field.

5. That the right to enter into private contracts can not be used as a means to circumvent lawful orders of the Commission or valid laws passed by the Legislature. Therefore the fact that Northern Natural Gas Company may be contractually bound to take a certain quantity of gas from

certain wells is not binding on the Commission in its duty to regulate the production of gas from the entire field.

6. That Northern Natural Gas Company should be ordered to take gas ratably from its connections in the Kansas Hugoton Gas Field.

It Is, Therefore, by the Commission Ordered: That Northern Natural Gas Company be and it is hereby ordered to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders and promulgating and implementing such further rules and regulations as from time to time it may deem proper.

By the Commission It Is So Ordered.

Raymond B. Harvey
Secretary

(Seal)

APPENDIX E

NO. 42,127

NORTHERN NATURAL GAS COMPANY,
Appellant,
v.
STATE CORPORATION COMMISSION,
Appellee.

SYLLABUS BY THE COURT

Gas—*Order of Corporation Commission—Requiring Ratable Taking by All Purchasing Companies.*

Pursuant to the provisions of G. S. 1949, 55-703, as amended, the State Corporation Commission has power to issue an order promulgating a rule to regulate the

production of natural gas in such a manner as to require all gas purchasing companies to take natural gas ratably from all wells within the same common source of supply to which each is connected.

Appeal from Finney district court: ROLAND H. TATE, judge. Opinion filed June 10, 1961. Affirmed.

Mark H. Adams, II, of Wichita, argued the cause, and *Mark H. Adams, Charles E. Jones, William I. Robinson, J. Ashford Manka, Clifford L. Malone, John S. Seeber* and *Floyd E. Jensen*, all of Wichita, and *Lawrence I. Shaw, F. Vinson Roach* and *Patrick J. McCarthy*, all of Omaha, Nebraska, and *Ray H. Calihan, Logan N. Green, Daniel R. Hopkins* and *Ray H. Calihan, Jr.*, all of Garden City, were with him on the briefs for the appellant.

Charles C. McCarter, General Counsel, argued the cause, and *S. F. Fleeker*, Assistant General Counsel, was with him on the briefs for the appellee.

The opinion of the court was delivered by

SCHROEDER, J.: This is a judicial review action to determine the validity of a State Corporation Commission order and rule directed to gas purchasers, rather than gas producers, requiring them to purchase ratably from all wells within the common source of supply to which each purchaser is connected.

The petition for judicial review was filed on February 19, 1960, by Northern Natural Gas Company (hereinafter referred to as Northern or appellant) in the district court of Finney County, Kansas. Thereafter on the 8th day of April, 1960, the district court having heard argument of counsel entered its judgment confirming the Commission's order of February 3, 1960, and the Commission's promulgation of Rule 82-2-219 thereby. The lower court found the rule and order of the State Corporation Commission to be lawful, valid and reasonable.

After the trial court overruled Northern's motion for a new trial, appeal was duly perfected to this court.

In a companion case, *Northern Natural Gas Co.* v. *State Corporation Commission*, 188 Kan , P.2d , No. 42,128, decided this date, Northern was directed by the State Corporation Commission to show cause why it should not take ratably from the wells to which it was connected in the Hugoton Field in Kansas. As a result of proceedings therein Northern was directed by an order of the Commission "to take gas ratably from its connections in the Kansas Hugoton Gas Field." As a part of such order the Commission retained jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders and promulgating and implementing such further rules and regulations as from time to time it deemed proper.

In Northern's petition for rehearing before the Commission, filed November 6, 1959, Northern contended, among other things, the order directed against it was unlawful in that:

> "(d) It purports to amend said Commission's Basic Proration Order for the Hugoton Gas Field insofar only as it affects one (Northern Natural Gas Company) of the seven principal purchasers of gas therein and in a proceeding not noticed to any party as being a proceeding for the amendment of said Basic Proration Order all in violation of the due process clause of the Constitution of the United States."

Northern's petition for rehearing in the "show cause" case was denied and judicial review proceedings concerning the Commission's order dated October 7, 1959, were filed in the district court of Finney County, Kansas, now on appeal in the Supreme Court as Case No. 42,128, heretofore noted as the companion case.

The Commission, in apparent recognition of Northern's objection heretofore quoted, sought to bolster its position in the case against Northern, which arose from circumstances applying only to that company, and on November 12, 1959, on its own motion ordered an investigation and hearing for the purpose of considering the adoption of a rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected. In issuing such order the Commission found:

"1. That G. S. 1949, 55-703, as amended, imposes the following duty on this Commission:

> "'The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation . . .'

"2. Evidence presented to the Commission indicates that some companies have been and are producing certain wells at higher rates than other wells in the same common source of supply; that this disparity in rates of production has resulted in the accumulation of sizable underages by many wells while others are producing their current allowables; that such situation, if permitted to continue, would violate correlative rights, and the statutory provision above set forth.

"3. That in effectuating its statutory duty in the premises, an investigation should be instituted and a public hearing held thereon for the purpose of considering the adoption of a Rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected."

Pursuant to such findings the Commission ordered:

". . . That an investigation be and it is hereby instituted herein for the purpose of considering the adoption of a Rule to require companies to take gas ratably from all wells to which they are connected in the same common source of supply."

Notice was duly published on December 5, 1959, in the Topeka Daily Capital and a copy of such notice was mailed to all interested parties. Pursuant thereto a hearing was conducted in which the interested parties entered an appearance to present evidence and arguments on the matter.

The Commission, recognizing that it was prompted to conduct the instant proceedings by its docket in the matter of Northern to show cause (Docket No. 60,740-C), in which considerable evidence was taken, ordered the testimony and exhibits in Docket No. 60,740-C incorporated and made a part of the record. Therefore, the facts upon which the rule was promulgated in the instant case are in all material respects identical and present the same issues as the companion "show cause" case.

As a result of the hearing the Commission found pursuant to its duty under G. S. 1949, 55-703, as amended, that it was necessary to promulgate and adopt a rule requiring all companies to take natural gas ratably from all wells within the same common source of supply to which each is connected, and by its order dated February 3, 1960, adopted Rule 82-2-219, which reads:

"Ratable Production of Gas from Common Source of Supply.

"In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such

wells in substantially the same proportionate status as to overproduction or underproduction: provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser." (Authorized by G.S. 1959, Supp. 55-703; Effective February 8, 1960)."

In promulgating such rule the Commission found it met the mandate of the statute and enabled the Commission "to regulate production of natural gas in such a manner as to require companies to produce ratably from all wells within the same common source of supply to which they are connected."

The Commission's general rules and regulations for the conservation of crude oil and natural gas were amended by adding Rule 82-2-219, and the Commission directed that its order and rule be filed with the Revisor of Statutes on February 8, 1960, at which date it was to be published and become official.

The contentions of the appellant are presented in its brief by what it denominates "Questions Involved." They are as follows:

"I.

"Said order and the rule promulgated thereby, approved by the trial court, and each of the findings of fact therein purporting to be in support thereof are not supported by substantial, competent, relevant evidence, and are unauthorized by and contrary to the Kansas Statutes dealing with the production and conservation of natural gas, the basic proration order for the Kansas Hugoton Gas Field and Commission's state-wide gas conservation rules and regulations.

"II.

"Said order and the rule promulgated thereby as approved by the trial court are arbitrary, unreasonable and discriminatory, have no relation to proration or conservation of gas, burden interstate commerce and take appellant's property and contract rights all in violation of the Commerce Clause, the Contract Clause and the Fourteenth Amendment to the Federal Constitution, and the Kansas Bill of Rights, Sections One, Two and Eighteen, and Section Seventeen, Article Two of the Kansas Constitution.

"III.

"Said order and the rule promulgated thereby as approved by the Court under the evidence as applied to appellant violates the provisions of the Natural Gas Act (15 USCA, 717 et seq) and invades the jurisdiction of the Federal Power Commission thereunder."

The foregoing contentions are identical with those advanced by Northern in the companion "show cause" case, No. 42,128, where they have been considered and answered by the court, upholding the power of the Kansas Corporation Commission to regulate the production of natural gas in such a manner as to require Northern to take gas ratably from all gas wells in the Kansas Hugoton Gas Field to which its lines were connected.

It follows that if the Commission has authority pursuant to G. S. 1949, 55-703, as amended, (now G. S. 1959 Supp., 55-703) to lawfully issue such order with respect to one company, *a fortiori*, the Commission may lawfully promulgate and adopt a rule requiring all gas purchasing companies to take natural gas ratably from all wells within the same common source of supply to which each is connected.

We therefore hold Rule No. 82-2-219 and the order promulgating it are valid and lawfully adopted pursuant

to the power conferred upon the State Corporation Commission by the provisions of G. S. 1949, 55-703, as amended.

The judgment of the lower court is affirmed.

Schroeder, J., dissents.

APPENDIX F
(Omitting Formal Parts)

JOURNAL ENTRY.

Now on this 8th day of April, 1960, there comes on for consideration and determination by the Court the petition of Northern Natural Gas Company for judicial review of the State Corporation Commission's Rule 82-2-219, entitled "Ratable Production of Gas From a Common Source of Supply," promulgated on February 8th, 1960, and the February 8th, 1960 Order of said State Corporation Commission promulgating said rule. The petitioner appears by its attorneys of record, and the respondent, State Corporation Commission, appears by its attorneys of record.

Whereupon, the Court having examined the files and records herein, and having heard the arguments of counsel on March 15, 1960, finds that the said rule and order of the State Corporation Commission are lawful, valid and reasonable, and should be affirmed.

It Is, Therefore, by the Court Considered, Adjudged and Ordered: That the State Corporation Commission's Rule 82-2-219, entitled "Ratable Production of Gas from a Common Source of Supply," promulgated on February 8, 1960, and the February 8, 1960 Order of said State Corporation Commission promulgating said rule are affirmed.

By the Court,
/s/ Roland H. Tate,
Judge.

APPENDIX G

(Omitting Formal Parts)

ORDER.

Now on this 3rd day of February, 1960, the above-entitled matter comes on for consideration and determination by the State Corporation Commission, hereinafter referred to as the Commission. The Commission (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners) having heard the evidence and examined the files and records, and thereby being fully advised in the premises, finds:

1. That on November 12, 1959, the Commission, upon its own motion, ordered an investigation and hearing for the purpose of considering the adoption of a rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected. That notice of the time and place of said investigation and hearing was published on December 5, 1959, in the Topeka Daily Capital, and that a copy of such notice was mailed to all interested parties. Pursuant to notice, a public hearing was held on December 17, 1959, at the Lassen Hotel, Wichita, Kansas. Appearances were as follows:

Lewis M. Poe and Stuart Carter, representing Colorado Interstate Gas Company;

Stuart R. Carter, representing Sinclair Oil and Gas Company;

Alfred O. Holl and P. K. Smith, representing Cities Service Oil Company;

Ralph R. Brock, representing Northern Pump Company; and W. L. Hartman;

Richard Jones, representing Republic Natural Gas Company;

Milo M. Unruh, representing Kansas-Colorado Utilities, Inc.;

Norton Standaven and Charles Lindberg, representing Pan-American Petroleum Corporation;

O. R. Stites, representing Cities Service Gas Company;

Jeff A. Robertson and C. C. Linley, representing Panhandle Eastern Pipe Line Company;

A. E. Kramer and Dale Stucky, representing Southwest Kansas Royalty Owners Association;

George W. Selinger, representing Skelly Oil Company;

Mark H. Adams, Mark H. Adams, II, and Jack C. Osborne, representing Northern Natural Gas Company;

W. P. Wesley, representing Western Natural Gas Company;

J. L. Higday, representing Kansas Power and Light Company;

J. Robert Wilson and John Townsend, representing the Commission

The hearing was adjourned for the purpose of receiving and disseminating proposals, until January 21, 1960, at which time the hearing reconvened. Appearances in addition to those entered at the hearing of December 17, 1959, were as follows:

Stanford Smith, representing Cities Service Oil Company;

Homer Penn, representing Republic Natural Gas Company;

Richard Jones, representing Superior Oil Company, a California corporation;

Milo M. Unruh, representing Plateau Natural Gas Company;

Richard Jones and William R. Loar, representing Sunray Mid-Continent Oil Company;

Ferd Evans, representing J. M. Huber Corporation;

Donald Mitchell, representing Atlantic Refining Company;

Daniel R. Hopkins, representing Hugoton Production Company;

W. P. Wesley, representing Columbian Fuel Corporation; and

Charles Lindberg, representing Mobil Oil Company, a division of Socony-Mobil Oil Company, Inc.

2. That G.S. 1949, 55,703, as amended, imposes the following duty on this Commission:

> "The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. * * *"

3. That for the purpose of facilitating such regulation, and thereby accomplishing the duty contemplated by the statute, it is necessary that the Commission promulgate and adopt a rule requiring all companies to take natural gas ratably from all wells within the same common source of supply to which they are connected.

4. That the Commission's staff and other parties have submitted proposals at the hearings, and subsequent thereto, which have been considered by the Commission.

5. That Exhibit "A", designated as Rule 82-2-219, meets the mandate of the statute and will enable the

Commission to regulate production of natural gas in such a manner as to require companies to produce ratably from all wells within the same common source of supply to which they are connected; and that the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas should be amended by adopting the proposed Rule as contained in Exhibit "A", and that said proposal should be designated Rule 82-2-219.

6. That Rule 82-2-219 is of statewide application and should therefore be filed with the Revisor of Statutes on February 8, 1960. This order and Rule 82-2-219, which is attached hereto as Exhibit "A" and made a part hereof, should be served upon all parties affected by this rule by first class United States mail. Further notice should be given by publishing this order including Rule 82-2-219 in the official state paper; on February 8, 1960, and this rule shall become effective on February 8, 1960.

It Is, Therefore, by the Commission Ordered: That Rule 82-2-219 be, and it is hereby, added to the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas; and this order and Rule 82-2-219 be filed with the Revisor of Statutes on February 8, 1960, and shall also be in full force and effect on February 8, 1960.

And It Is Further Ordered: That this order and said rule, duly certified, be served upon all parties to be affected by first class United States mail and that further notice be given by publishing this order including Rule 82-2-219 in the Official State Paper, on February 8, 1960.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders, and promulgating and implement-

ing such further rules and regulations as from time to time it may deem proper.

By the Commission It Is So Ordered.

Wiles, Chm.; Beatty, Com.; Byrd, Com.

EXHIBIT "A".

Rule 82-2-219

RATABLE PRODUCTION OF GAS FROM COMMON SOURCE OF SUPPLY.

In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G.S. 1959, Supp. 55-703; Effective February 8, 1960).

APPENDIX H

55-707. Actions for judicial review; appeals. That actions for judicial review of any rule, regulation, order or decision of the commission under the provisions of this act may be brought and proceedings respecting same shall be governed by and appeals may be taken as provided in section 55-606 of the General Statutes of Kansas of 1935, as amended and that each and all of the provisions of

said section, as so amended, shall apply to and govern such actions arising under this act.

55-606. Petition for rehearing; actions against commission; abstract to be filed; transcript; appeals to supreme court. Any action for judicial review of any rule, regulation, order or decision of the commission may be brought against the commission in the district court of any county in the state wherein the property affected thereby is located, or, if the property affected thereby is located in different counties, then the jurisdiction shall lie in either of such counties. Before any such action may be brought by a person who was a party to the proceeding resulting in the making of a rule, regulation, order, or decision of the commission, a petition for rehearing shall first be filed with the commission within ten days from the date of the making of the rule, regulation, order, or decision in question. A rehearing shall be granted or denied by the commission within ten days from the date said petition is filed and if rehearing be not granted within ten days it shall be taken as denied. If rehearing be granted the matter shall be set for hearing as promptly as shall be convenient, and shall be determined by the commission within thirty days after the same shall be submitted. Such action may be brought by any person aggrieved, whether or not such person was the applicant for rehearing, within thirty days after the denial of the petition for rehearing, or, if rehearing is granted, then within thirty days after the final decision by the commission. If no petition for rehearing be filed, then any person aggrieved who shall not have been a party to any such proceeding before the commission may bring an action for the judicial review of any such rule, regulation, order, or decision of the commission at any time after ten days and within thirty days from the date of the making of such rule, regulation, order or decision. Any rule, regulation, order or decision of the commission may be superseded by the district court upon such terms and conditions as it may deem proper.

All actions brought under this section shall have precedence in any court and on motion shall be advanced over any civil cause of different nature pending in such court, and such action shall be tried and determined as other civil actions. In any such action an abstract of the record of all evidence and proceedings before the commission shall be filed by the complaining party and a counter abstract may be filed by the commission or any other interested party. The district court may, when it deems it necessary and in the interest of justice, remand any such action to the commission with directions that the same be further investigated or additional evidence taken by the commission. After making such further investigation or receiving such additional evidence the commission may change, modify or set aside the rule, regulation, order or decision in question, and if the party who instituted the action for review in the district court shall not be satisfied with such decision, then upon written request of any such party, the commission shall make a report of its further investigation and final decision and send a certified transcript of such additional evidence as may have been tendered by any party in interest to the district court and thereupon the district court shall proceed to hear and determine the action upon the complete record. The court shall not be bound by any finding of fact made by the commission. The authority of the court shall be limited to a judgment either affirming or setting aside in whole or in part the rule, regulation, order or decision of the commission. Appeals to the state supreme court may be taken from the judgment of the district court as in other civil actions. Nothing herein shall be construed in any manner to change, restrict, prohibit, or to deny to any person any of the usual equitable remedies.

APPENDIX I

55-703. Production regulations; rules and formulas. Whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent: Provided, however, That the daily takes of gas from any well in an unprorated gas pool shall not exceed twenty-five percent (25%) of its open flow: Pro-

vided further, however, That the provisions of this act shall not apply to any common source of supply in which the average open flow of all the producing wells therein is not in excess of seven hundred fifty thousand (750,000) cubic feet per day. The commission in determining the market demand for gas from a common source of supply shall consider the reasonable current requirements for current consumption and use within and without the state, and such other factors, conditions, or circumstances that would aid in establishing the market demand.

MOTION TO DISMISS

Office-Supreme Court, U.S.
FILED
FEB 12 1962
JOHN F. DAVIS, CLERK

No. [redacted] 62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NORTHERN NATURAL GAS COMPANY, a Corporation,
Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 659

NORTHERN NATURAL GAS COMPANY, a Corporation,
Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

Pursuant to Rule 16, Paragraph 1(b), of the Rules of this Court, appellee, the State Corporation Commission of the State of Kansas, moves to dismiss the appeals filed herein on the ground that they do not present a substantial federal question.

QUESTION PRESENTED

Whether the Natural Gas Act deprives the State of Kansas of the authority to prevent drainage and thus protect the correlative rights of owners of natural gas resources within the State by requiring all purchasers from common sources of supply to take gas ratably from all of the wells to which they are connected.

STATUTES, ORDERS AND RULE INVOLVED

The Order of the State Corporation Commission found valid by the Kansas Supreme Court in Case No. 42,128 (R. 76-78)[1] provides in pertinent part as follows:

> "IT IS, THEREFORE, BY THE COMMISSION ORDERED: That Northern Natural Gas Company be and it is hereby ordered to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field."

The Order and Rule of the State Corporation Commission found valid by the Kansas Supreme Court in Case No. 42,127 (R. 94-98) provide in pertinent part:

> "IT IS, THEREFORE, BY THE COMMISSION ORDERED: That Rule 82-2-219 be, and it is hereby, added to the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas; and this order and Rule 82-2-219 be filed with the Revisor of Statutes on February 8, 1960, and shall also be in full force and effect on February 8, 1960. * * *
>
> RULE 82-2-219
>
> RATABLE PRODUCTION OF GAS FROM COMMON SOURCE OF SUPPLY.
>
> "In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall main-

[1] This case comes to this Court on two separate records. Except as otherwise noted, in order to avoid unnecessary duplication the citations to the record in this motion will be only to the record in Case No. 42,127, wherein is incorporated a large part of the record in Case No. 42,128.

tain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G.S. 1959 Supp., 55-703; effective February 8, 1960)."

The Kansas statutes upon which the aforesaid Orders and Rule of the State Corporation Commission are based (G.S. 1961 Supp., 55-703 and G.S. 1949, 55-704) are set forth in Appendix A.

STATEMENT OF THE CASE

This litigation involves the validity of an exercise of state regulatory authority precisely like that sustained in *Permian Basin Pipeline Co.* v. *Railroad Commission of Texas*, 358 U.S. 37, against the same kind of challenge that is made here. As Texas had done in the *Permian* case, so here Kansas has moved to prevent drainage and thus protect the correlative rights of owners of natural gas resources within its borders by requiring purchasers of natural gas from common sources of supply in Kansas to take ratably from wells in those common sources. This requirement means only that there may not be discrimination among wells by the taking of disproportionately high or low volumes of gas from any well. It does not provide that any purchaser must take any particular volume of gas, or indeed any gas, from any field, and it does not establish or otherwise regulate the price to be paid for any gas.

In the *Permian* case this Court rejected the contention that as a matter of federal law a state may not

validly require ratable taking by natural gas companies which are subject to the jurisdiction of the Federal Power Commission, and granted a motion to dismiss the appeal for want of a substantial federal question. The federal question which appellant seeks here to raise is no more substantial and indeed is identical.

Appellant is a "natural gas company" which takes gas from the wells of numerous producers in the Kansas Hugoton Gas Field. (R. 37-38) Until 1958 its taking of gas was generally ratable as among these wells. (R. 54-56) In that year, however, appellant began to take from the wells of one favored producer the full allowables allocated thereto by the Kansas Corporation Commission, and at the same time to take from the wells of all the other producers very substantially less than their allowables. (R. 54-58, 60-62, 68-69, 174-176) This discrimination by appellant among producers in a common source of supply resulted in drainage and a violation of correlative rights. It was this situation which the orders and rule challenged in this case were designed to remedy.

The factual background of this litigation is as follows: On December 21, 1945, Northern Natural Gas Company (hereafter "Northern") as buyer, and Republic Natural Gas Company (hereafter "Republic") as seller, executed a gas purchase contract covering certain gas reserves in the Kansas Hugoton Gas Field. (R. 38-42, 117-145) The 1945 contract was amended by the parties on June 30, 1953. (R. 146-168) The basic contract of December 21, 1945, as amended in 1953, will hereafter be referred to as the "Republic A contract" and the wells covered by the contract as

the "Republic A wells". This contract contains a provision which expressly subjects the rights of the parties to all present and future valid orders, rules and regulations of any regulatory body of the state or federal government. (R. 59, 145)

On September 9, 1949, Northern, as purchaser, entered into a contract with Cities Service Oil Company for the purchase of a substantial volume of gas to be produced by the latter company from wells also located in the Kansas Hugoton Field. (R. 45-49) At various times from 1938 to the present Northern has also entered into gas purchase contracts for additional supplies of gas in the Kansas Hugoton Field from various producers other than Republic and Cities Service. (R. 45-46) These latter contracts, for the most part, involve fewer wells than are covered in either the Republic A contract or the Cities Service Oil Company contract. (R. 46)

The Republic A contract provides in substance that Northern is to take from the Republic A wells that volume of gas necessary to supply 60% of the requirements of Northern's Omaha District. (R. 40-42) By 1947 this quantity of gas had come to exceed the allowables assigned by the Kansas Corporation Commission to the Republic A wells. (R. 44) This situation led to litigation, and in *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P. 2d 708 (1952), the Supreme Court of Kansas ruled that the Republic A contract was necessarily subject to allowable orders issued by the Corporation Commission. Accordingly, the court held that Northern was contractually obligated to take from the Republic A wells only the amount of the allowables assigned to

those wells even if that amount was smaller than the amount specified in the contract.

Since this decision Northern has taken from the Republic A wells the full allowables allocated to them by the State Corporation Commission. (R. 45) Starting in 1958, however, it began to take from the other wells to which it is connected in the Hugoton Field substantially less than the allowables assigned by the Commission to those wells.[2] (R. 58) Thus Northern was taking gas from the Republic A wells at a much greater rate than from the other wells to which it is connected.[3]

---

[2] Although Northern's contracts with these other producers provide for ratable taking, the contracts specifically subordinate that obligation to the provisions of the Republic A contract. Exhibit 6 (the ratable take provisions in the Cities Service Oil Company contract) is typical of the ratable take provisions in all of the other contracts under which Northern buys gas in the Hugoton Field. (R. 47-48)

[3] An example of the lack of ratable taking by Northern is found in comparing takes from Cities Service wells with takes from Republic A wells. In January 1959 the Cities Service wells connected to Northern's lines had a monthly allowable of 2,084,874 Mcf. They had an underage of 11,411,727 Mcf and 123,711 Mcf of these underages were cancelled by the Commission under its general rules as being underproduced in excess of six times the January current allowable. Northern's other connections, aside from Republic A wells, had a January current allowable of 9,309,441 Mcf and a total underage of 48,604,070 Mcf. The net status of these wells was 522.09 per cent *underproduced*, and they suffered cancellations of 409,393 Mcf of the aforementioned underage. In contrast, Republic A wells had a current January allowable of 2,674,390 Mcf and an overage of 114,858 Mcf and were *overproduced* 4.29 per cent in that month. Comparison of the 522.09 per cent underage of the other wells with the 4.29 per cent overproduction of Republic A wells shows the gross lack of ratable production from these two groups of wells in the Kansas Hugoton Gas Field. (R. 174-176) See also R. 54-58, 60-62, 68-70.

As a result of Northern's failure to take gas ratably from all of the wells in the field to which it was connected, drainage across lease lines occurred, and the correlative rights of producers other than Republic were injured and prejudiced by an escape of gas from their leases to those of Republic.[4] (R. 68-73, 174-176)

On October 7, 1959, the State Corporation Commission, having heard extensive testimony and having received voluminous evidence, ordered Northern to take gas ratably from all wells to which its pipeline system is connected in the Kansas Hugoton Gas Field. (R. 76-78) Subsequent thereto, and after due notice and hearing, the Commission issued an order and accompanying rule, effective February 8, 1960, directing every purchaser of gas in Kansas, including Northern, to take gas ratably from its connections in each common source of supply under proration by the Commission. (R. 94-98)

On April 8, 1960, the Kansas District Court affirmed the Orders and Rule of the State Corporation Commission. (R. 88-89, No. 42,128; R. 109-110, No. 42,127) Thereafter the Kansas Supreme Court, in Case No. 42,128, affirmed the lower court's decision uphold-

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[4] An expert witness testified: "In comparing that we see that Northern Natural Gas Company, excluding Cities Service Oil Company and Republic "A" connections, had 522.09 (percent underproduction); Republic Natural Gas Company (Group "A"), 4.29; and with the Cities Service Oil Company's connections, 547.36 percent. To have everything ratable here, each one of these figures should be around 425.77 percent underproduced. • • • I have expressed an opinion that there is drainage occurring. Our studies indicate that if the wells are produced with the same percent of allowable production or of net allowable production, then the wells will be ratable, and correlative rights will be protected." (R. 175-176)

ing the validity of the Commission's order requiring Northern to take gas ratably in the Kansas Hugoton Field. (R. 153-167, No. 42,128) The Court also, in Case No. 42,127, affirmed the lower court's decision upholding the validity of the Commission's Order and Rule directing all purchasers of natural gas to take gas ratably from each common source of supply under proration in Kansas. (R. 180-184, No. 42,127) Northern's petitions for rehearing in the Kansas Supreme Court were denied. (R. 181-184, No. 42,128; R. 200, No. 42,127)

ARGUMENT

The only question raised by this appeal—whether the Natural Gas Act (15 U.S.C. § 717 *et seq.*) deprives the states of their historic authority to protect the correlative rights of owners of natural gas resources by regulation designed to assure ratable production from wells in a common source of supply—has already been presented to this Court and found to be insubstantial. In *Permian Basin Pipeline Co.* v. *Railroad Commission of Texas,* 302 S.W. 2d 238 (Tex. Civ. App. 1957), *appeal dismissed,* 358 U.S. 37, there was at issue a Railroad Commission order relating to the Puckett-Ellenburger Gas Field, providing in part (302 S.W. 2d at p. 245):

> "Each common purchaser of gas connected to wells in said field is required to take ratably in accordance with the percentage allowable factors established by the Commission and is required to maintain all of the prorated wells connected to its facilities in substantially the same percentage status as to overproduction and underproduction."

The facts that led to the promulgation of the order involved in the *Permian* case, and the contentions of

the appellant there, were in substance identical to those in this case. Permian was, like Northern, a "natural gas company" within the meaning of the Natural Gas Act.[5] As is the case with Northern, its purchases of natural gas in the field were made under contracts on file with the Federal Power Commission and the prices established in the contracts were subject to regulation under the Natural Gas Act. Permian took gas disproportionately as among producers in the field, just as here Northern has taken disproportionately as among the Republic A wells and its other connections in the Kansas Hugoton Field. As Northern attempted to do in this case, Permian sought to justify its favoritism of one producer as against others on the basis of its contractual arrangements with the various producers, which provided for the taking by Permian of a certain volume from the favored producer and further provided that Permian's obligation to take ratably under its contracts with the other producers was subordinate to this arrangement with the favored producer. Finally, Permian claimed, as Northern claims here, that the effect of the Commission order would necessarily be to force it either to take less from the favored producer than required by contract, thereby subjecting it to potential liability to that producer, or to increase its purchases from the other producers in the field to a level greater than its needs. See Jurisdictional Statement, No. 64, Oct. Term 1958.

The Texas court, in considering Permian's contention that the State was without authority to require it

[5] Indeed Permian, which unsuccessfully raised before this Court the very point upon which Northern here relies, was at the time of the Permian case a subsidiary of Northern and in December 1960 was merged into the latter company.

to take ratably from wells in the common source of supply where it purchased, referred to the authority of the Railroad Commission under the Texas statutes to prorate and regulate gas well production from a common source for the prevention of waste and the protection of correlative rights. The Court noted that in order for the Commission effectively to discharge its statutory duties it was essential that it be able to make orders resulting in ratable production, and that this was the purpose and effect of the challenged order. The Court stated (302 S.W. 2d at p. 253):

> "Ratable production and ratable take or purchase are essential in preventing drainage between leases * * *. The orders involved herein were adopted to bring about ratable production of gas in the field and the requirement that appellee as a common purchaser purchase ratably is for the purpose of insuring ratable production, and only require [sic] appellee to purchase ratably."

As above noted, on appeal to this Court Permian contended *inter alia* that the ratable taking order conflicted with the Natural Gas Act and was therefore void. The Railroad Commission filed a motion to dismiss for want of a substantial federal question, pointing out that the states' authority to regulate production of natural gas by requiring ratable taking had long been recognized and that no reasonable basis existed for contending that the Natural Gas Act had deprived the states of this authority. The motion was granted by this Court.

In thus rejecting the contention that the Natural Gas Act deprives the states of the authority to require the ratable taking of natural gas from common sources

of supply to prevent drainage and protect correlative rights, this Court did no more than apply established principles of law. It is well settled that the Natural Gas Act was not designed to supplant or to destroy state regulatory jurisdiction in areas which the states were recognized at the time of the Act's passage as being constitutionally capable of regulating. Rather, that statute was intended only to fill the "gap * * * thought to exist at the time the Natural Gas Act was passed" by providing federal regulation of those aspects of the natural gas business which the states were at the time of that passage believed to be constitutionally unable to regulate. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 684, 685-687. This interpretation of the scope of the Act is squarely supported by the unequivocal statement in the House Committee Report on the bill (H.R. Rep. No. 709, 75th Cong., 1st Sess., p. 2):

> "The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority * * *."

See also *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-503, 512-513; *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 690.[6]

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[6] This is not, of course, to say that the Natural Gas Act permits regulation by the states in all the areas in which, under constitutional standards *now* prevailing, they would be free to act in the absence of conflicting federal regulation. As was pointed out in Phillips (347 U.S. at p. 684):

> "* * * it is well settled that the gap [which the Natural Gas Act was intended to fill] * * * is that thought to exist at the time the Natural Gas Act was passed, and the juris-

At the time of the passage of the Natural Gas Act, it had long been firmly established that the authority of the states to insure by appropriate regulation the prevention of drainage and waste and the impairment of correlative rights of owners of natural gas resources could be exercised consistent with the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 22; *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210; *Walls* v. *Midland Carbon Co.*, 254 U.S. 300, 323; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61; *Ohio Oil Co.* v. *Indiana*, 177 U.S. 190. And this Court has held that this established authority included the right to require ratable taking. In *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 185, the Court said:

> "This Court has upheld numerous kinds of state legislation designed to curb waste of natural resources and to protect the correlative rights of owners through ratable taking, Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932) * * *."[7]

That the ratable take orders and rule here involved were designed to prevent drainage and protect correl-

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diction of the Commission is not affected by subsequent decisions of this Court which have somewhat loosened the constitutional restrictions on state activities affecting interstate commerce, in the absence of conflicting federal regulation."

It is for this reason that this Court was able to hold in 1950 that the Commerce Clause did not forbid state minimum price orders applying to sales of natural gas in interstate commerce (Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179) and shortly thereafter to hold (Natural Gas Pipeline Co. v. Panoma Corporation, 349 U.S. 44) that this kind of regulation was nevertheless inconsistent with the Natural Gas Act.

[7] The Champlin case was decided three years prior to the passage of the Natural Gas Act.

ative rights is clearly shown in the opinion of the Supreme Court of Kansas in this case. As that Court noted (R. 156, No. 42,128):

> "We do not read the record to show that there is any contention but that drainage was occurring, and that the underproduced wells were losing the right to produce gas from the common source of supply to the great damage of the owners of the wells in the loss of their correlative rights.
>
> "While the members of this court make no claim to be experts in the science of the production of natural gas, we believe that the court may take judicial notice of the fact that where natural gas is within the earth in one common source and is under pressure, if one gas well is allowed to take gas, this will result in the pressure being lowered around the vicinity of this gas well so that the gas in the common source will tend to drain or rush to the vicinity of the well taking gas. The result will be that the other wells in the common field of source will be able to produce much less gas and the owners of such wells will have suffered a definite loss"[8]

[8] That orders requiring ratable purchase are designed to protect the correlative rights of producers in a common source of supply has also been recognized by an eminent authority in the field of oil and gas law:

> "Statutes making pipe line companies common purchasers of oil and gas are, in purpose and effect, conservation measures, and so operate, whether the production of oil or gas from a common source of supply is or is not restricted and prorated among the wells therein for the prevention of waste. Courts in most of the oil and gas producing states have held that a state may validly legislate for the prevention of waste of oil and gas and for the protection of the correlative rights of owners and lessees, in a common source of supply. Legislative enactments and judicial opinions have repeatedly stated that conservation measures and the orders and regulations of conservation agencies should be such as to afford the owner of each tract of land in a common source of supply of oil or gas the opportunity to produce his just and equitable

Accordingly, since it is clear that at the time of the passage of the Natural Gas Act the constitutional authority of the states to require ratable taking from common sources of supply to prevent drainage and protect correlative rights was well established, it follows that appellant's contention that the Act should be construed to deprive the states of this authority is without substance.

Appellant argues that because the orders and rule which it challenges operate upon natural gas which is to be sold in interstate commerce for resale, those regulations necessarily encroach unlawfully upon an area of exclusive federal jurisdiction. The difficulty with this argument is that if accepted it would invalidate not only the orders here, but every state proration order restricting production from gas leases if the gas from those leases had theretofore been dedicated by contract to the interstate market. Appellant expressly concedes, as it must, that nothing in the Natural Gas Act prevents this kind of state proration "for purposes of conservation and protection of correlative rights" (Juris. Statement, p. 16, n. 16), and with this concession its arguments fall.[9]

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share of the oil or gas therein and to use therefor his just and equitable share of the reservoir energy. Unless all the producers in a common source of supply have equal opportunity to sell or to transport oil and gas from their wells, they are not afforded the opportunity to produce their just and equitable share of the oil or gas or to utilize their just and equitable share of the reservoir energy." (4 Summers, *The Law of Oil and Gas*, perm. ed., Sec. 754, p. 182.)

[9]Appellant's suggestion that the exercise of state power here involved is invalid because the "production or gathering" exemption of Section 1(b) of the Natural Gas Act (15 U.S.C. § 717(b)) does not apply to sales of natural gas in interstate commerce for resale (Juris. Statement, pp. 22-23) misconceives both the char-

It is to be emphasized that the challenged orders and rule do not in any way touch upon the price which Northern is to pay for the gas which it purchases, a matter which is within the exclusive jurisdiction of the Federal Power Commission.[10] For that reason cases such as *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44, *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, and *Michigan Wisconsin Pipe Line Co.* v. *Corporation Commission of Oklahoma*, 355 U.S. 425, holding that the states cannot validly fix minimum prices for natural gas sold in interstate commerce for resale, are not in point. The decisions cited by appellant dealing with the authority of the Federal Power Commission to grant certificates of convenience and necessity for facilities used for the transportation or sale of natural gas in interstate commerce or with the authority of the Commission to regulate other incidents of contracts for the sale of natural gas in interstate commerce (*e.g.*, *Federal Power Commission* v. *Transcontinental*

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acter of that state power and the fundamental reason why its exercise is valid. Kansas is not attempting to regulate sales in interstate commerce; it is regulating the production and taking of natural gas to prevent drainage and thus to protect correlative rights. In addition, as we have shown, the Natural Gas Act does not deprive the State of this power because it is a power that the State could constitutionally have exercised under the decisions of this Court prior to the passage of the statute. The latter point finds support in, but does not depend upon, the "production or gathering" exemption of Section 1(b), which marks a limit on federal regulatory power but which does not attempt to specify all matters that the statute leaves to the regulatory powers of the states.

[10] The record is devoid of any evidence that the orders or rule have affected or will affect in any way the price at which gas is sold or purchased. Indeed a witness for appellant, when specifically asked whether those orders or that rule, or the orders of the Federal Power Commission, affect the price of gas, responded only that the latter orders have such an effect. (R. 67-68)

Gas Pipe Line Corp., 365 U.S. 1; *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170; and *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137) are equally wide of the mark, since those cases in no way were concerned with the ratable taking of natural gas. The orders and rules here involved do not direct appellant to purchase any particular volume of gas nor do they otherwise impinge upon any matters which are subject to the exclusive regulatory authority of the Federal Power Commission.[11] As the Supreme Court of Kansas stated in its opinion denying rehearing (R. 183, No. 42,128):

> "This case involves nothing to our knowledge which has anything to do with the price paid by the purchaser for gas, nor how much gas he buys. The only matter here involved is whether the taker must take ratably from all wells to which he is connected and thus preserve the rights of the land owners."

Northern's suggestion that compliance by it with the orders and rule of the Commission will subject it to contractual liability to Republic—a contention identical to that made by the unsuccessful appellant in the *Permian* case, *supra*—is both without substance and irrelevant. The Supreme Court of Kansas noted

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[11] In its Jurisdictional Statement (p. 25) Northern asserts that the orders and rule are designed "to force Northern to increase its purchases of gas from the wells to it connected in the Kansas Hugoton Gas Field, beyond the amount of gas it requires therefrom to satisfy its interstate markets and in excess of its contractual obligations to producers to it connected in the field." This statement is baseless. The orders and rule do not require Northern to take any gas whatsoever from the field; they provide only that to the extent that Northern does take gas it must do so in a manner which does not discriminate among producers and encroach upon correlative rights.

that the contract between Republic and Northern is expressly made subject to "all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction", and indicated that accordingly the contractual obligations of the parties are *pro tanto* modified by the regulations here challenged (R. 158-159). See also *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P. 2d 708 (1952). In any event, it is settled that persons are not exempt from otherwise valid regulation simply because they have previously entered into contractual undertakings which are inconsistent with the regulatory scheme. See, *e.g.*, *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349.

CONCLUSION

For the foregoing reasons and on the authority of *Permian Basin Petroleum Co.* v. *Railroad Commission of Texas*, 358 U.S. 37, these appeals should be dismissed.

Respectfully submitted,

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February 12, 1962

APPENDIX A

Statutes Involved

Kansas G.S. 1961 Supp. 55-703 provides:

"Production regulations; rules and formulas. Whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corperation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent: Provided, however, That the daily takes of gas from any well in an unprorated gas pool shall not exceed twenty-five percent (25%) of its open flow: Provided further, however, That the provisions of this

act shall not apply to any common source of supply in which the average open flow of all the producing wells therein is not in excess of seven hundred fifty thousand (750,000) cubic feet per day. The commission in determining the market demand for gas from a common source of supply shall consider the reasonable current requirements for current consumption and use within and without the state, and such other factors, conditions, or circumstances that would aid in establishing the market demand."

Kansas G.S. 1949, 55-704 provides:

"Rules and regulations authorized; notice and hearings. The commission shall promulgate such rules and regulations as may be necessary for the prevention of waste as defined by this act, the protection of all water, oil or gas-bearing strata encountered in any well drilled in such common source of supply, ascertaining the several factors entering into the determination of the productive capacity of each well, the total productive capacity of all wells in the common source of supply, the establishment of such other standard or standards as the commission may find proper to determine the productive capacity of each well and of all wells in such common source of supply, and as the commission may find necessary and proper to carry out the spirit and purpose of this act: Provided, however, That notice, as provided in section 8 [55-706] of this act, shall be served upon or given to the producers and purchasers of natural gas and all other persons, firms or corporations interested, of any hearing or hearings which may be called for the purpose of establishing any facts upon which any proposed rule or regulation may be based."